CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT, PETITIONER,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 16, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT, PETITIONER,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Objection to claim	1	1
Proof of claim	2	1
Exhibit "A"—Statement as to claim	5	3
Indenture of lease, Nov. 7, 1925	6	4
Amended proof of claim	17	11
Exhibit "A"—Statement as to claim	20	13
Notice of hearing	22	15
Extract from minutes of hearing	23	15
Memorandum of referee	26	17
Order of referee	27	18
Notice of filing petition for review	28	18
Petition for review	30	19
Order of referee (copy) .... (omitted in printing) ..	33	
Certificate of referee	35	21
Memorandum, Coxe, D. J.	38	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1934.

—5498-C.

	Original	Print
Order appealed from	38	23
Notice of appeal	40	24
Petition for appeal	42	25
Allowance of appeal	43	26
Assignment of errors	44	26
Citation (omitted in printing)	45	
Stipulation as to transcript of record	47	27
Clerk's certificate (omitted in printing)	48	
Proceedings in U. S. C. C. A., Second Circuit	49	28
Decision	49	28
Order for mandate	50	28
Clerk's certificate (omitted in printing)	51	
Order allowing certiorari	52	29

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

OBJECTION TO CLAIM

To Hon. Oscar W. Ehrhorn, Referee in Bankruptcy:

Irving Trust Company, Trustee in Bankruptcy herein, does hereby object to the claim filed herein by Real Estate Associates, in the sum of $4,418.04, upon the ground that the indebtedness of the bankrupt to the said claimant is but the sum of $1,086.27.

The Trustee in Bankruptcy therefore prays that an order be entered reducing the said claim from the sum of $4,-418.04 to $1,086.27.

Dated, New York, April 27th, 1933.

McManus, Ernst & Ernst, Attorneys for Trustee, Office & P. O. Address: 170 Broadway, Borough of Manhattan, New York City.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PROOF OF CLAIM

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At the above District in the County of Suffolk, Commonwealth of Massachusetts, on the date hereinafter set forth, came Stephen W. Sleeper and makes oath and says:

I am one of the Trustees of the Real Estate Associates, a voluntary association having its usual place of business at Boston in said County of Suffolk and said Commonwealth; I reside at Boston in the County of Suffolk and said Commonwealth; I am duly authorized to make this proof of

claim on behalf of myself and Ingersoll Bowditch of said Boston, as Trustee of said Real Estate Associates, and as such trustees we are the claimants; the above named bankrupt was at and before the time of the filing of the petition in bankruptcy herein and still is, justly and truly indebted to the claimants in the sum of Forty-four Hundred Eighteen and 04/100 Dollars ($4418.04); the consideration of said [fol. 3] debt is rent of and charges for electricity consumed at the store numbered 102 Hanover Street in said Boston under the terms of Indenture of Lease dated November 7, 1925, annexed hereto, and for liquidated damages for breach of covenant contained in said Indenture of Lease, namely,

"and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term."

that the annexed statement marked "Exhibit A" sets forth in full the amount of the claimants' claim for which this proof is made; no part thereof has been paid; there are no offsets or counter claims thereto; the claimants have not nor has any person for or on behalf of the claimants, or to the deponent's knowledge or belief, had or received, for the use or benefit of the claimants, any security for [fol. 4] said debt; no judgment has been rendered therefor or for any part thereof; no note or other evidence of said debt has been received.

In executing and filing this proof of claim, the claimants in no way waive any rights which the claimants may have to reclaim specific assets and expressly reserve such rights. The claimants appoint Honorable Oscar W. Ehrhorn, Referee, proxy and attorney in fact, with full power to substitute in his place any other Referee acting in connection

with the bankrupt estate and authorize him or his substitute in the name and on behalf of the claimants to vote at the first or any subsequent meeting or meetings of creditors, or at any adjournments thereof, in favor of the election of the Irving Trust Company as Trustee of the bankrupt's estate, as fully as the claimants could do if present. Said attorney shall have no other authority or power to act for the claimants. All powers of attorney heretofore executed by the claimants in this proceeding, insofar as they authorize any person or persons to vote on the claimants' behalf in the choice of a Trustee, are hereby revoked.

Trustees of the Real Estate Associates, by Stephen W. Sleeper.

Subscribed, sworn to and acknowledged before me this ninth day of September, 1932, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

Clarence William Lowd, Notary Public.

[fol. 5] EXHIBIT "A" TO PROOF OF CLAIM

(1) Rent of store numbered 102 on Hanover Street, Boston, from March 1 to April 27, 1932, inclusive, under said indenture of lease	$791.67
(2) Charges for electricity furnished to and consumed at said premises from February 20 to April 27, 1932, in accordance with the provisions of said indenture of lease	173.61
(3) Liquidated damages in accordance with the above quoted provision of said indenture of lease computed as follows:	
(a) Rent reserved under said indenture of lease as amended by agreement made November 28, 1931, at the rate of $5,000 per year, as follows:	
July 18 to 31, 1932	$180.55
Aug. 1 to Dec. 31, 1932	2,083.30
For the year 1933	5,000.00
" " " 1934	5,000.00
" " " 1935	5,000.00
Total	$17,263.85

(b) Rental value of said premises at the rate of $4,000 per year from July 18, 1932, to expiration of lease, December 31, 1935, as follows:

[fol. 6] July 18 to 31, 1932	$144.44	
Aug. 1 to Dec. 31, 1932	1,666.65	
For the year 1933	4,000.00	
" " " 1934	4,000.00	
" " " 1935	4,000.00	
Total	13,811.09	
Liquidated damages		3,452.76
(4) Grand Total		$4,418.04

(Note.—The Receiver appointed by the Bankruptcy Court occupied said premises from April 27, 1932 to July 18, 1932, and duly paid for such occupancy.)

Lease

This indenture, made the Seventh day of November, in the year nineteen hundred and twenty-five, between Trustees of Real Estate Associates (hereinafter called the Lessor) of the one part, and Sarnoff-Irving Hat Stores, Incorporated, of New York City, (hereinafter called the Lessee) of the other part.

Witnesseth: That the Lessor doth hereby demise and lease unto the Lessee the following premises (hereinafter called the demised premises) to wit:

Store without basement #102 Hanover Street, Boston, Mass., with heat to warm said premises during reasonable [fol. 7] business hours, during the cold season of each year as hereinafter provided.

The Lessee agrees to conform to rules and regulations now or hereafter established by the Lessor for the general comfort and convenience of the tenants in the building #104 Hanover Street, Boston, Massachusetts.

The Lessee agrees to purchase from the Lessor, while he is willing and able to furnish such service, electricity for power or light in the leased premises to be measured by a meter to be furnished and installed by the Lessor and to

pay for the same, at the time herein specified for the payment of rent, and the rates charged by the Edison Electric Illuminating Company of Boston or its successors for similar service.

To have and to hold the demised premises unto the Lessee during the full term of Ten (10) years beginning with the First day of January, in the year nineteen hundred and twenty-six.

Yielding and paying therefor as rent, the sum of $6500 per annum for the 1st five (5) years & $7000—per annum for the last five (5) years, by equal monthly payments of one-twelfth of said annual rent in advance on the first day of each month, and at that rate for fractions of a month, in every year during said term, the first payment to be made on the first day of January, A. D. 1926.

The Lessor shall not be liable to the Lessee or to anyone claiming under the Lessee for any interruption or failure of heat, light, elevator or any other service, in case the Lessor shall undertake to furnish heat, light, elevator or [fol. 8] any other such service, if such interruption or failure shall be due to any cause beyond the Lessor's control, or to any accident, or to the making of repairs, alterations or improvements, to labor difficulties, or to inability to obtain coal, electricity, supplies or service from the sources from which they are usually obtained for said building.

And the Lessee doth hereby covenant with the Lessor that the Lessee, during the said term and for such further time as the Lessee or any other person or persons claiming under the Lessee shall hold the demised premises or any part thereof, will pay unto the Lessor the said rent at the times and in the manner aforesaid, and will also pay as they shall become due and payable all rates and charges for the use of water, gas, electricity and other agencies used in and upon the demised premises.

The lessee hereby further covenants that the Lessee will save the Lessor harmless and indemnified from all loss and damage occasioned by the use or escape of water or other agency upon or from the demised premises, or by the bursting of the pipes, or by any nuisance made or suffered on the demised premises or caused by the Lessee in said building or on the approaches thereto; and will not assign this lease nor underlet the whole or any part of the demised premises without first obtaining upon each occasion the consent in

writing of the Lessor; and will not permit any hole to be drilled or made in any part of the demised premises or in the permanent construction of said building or any sign, placard, awning or the like to be placed, painted, or in any [fol. 9] manner displayed on or affixed to or upon the demised premises or said building except such and in such place and manner as shall have been first approved in writing by the Lessor; and will keep the demised premises and all pipes, wires, glass, plumbing and other fixtures therein or used therewith repaired, whole and of the same kind, quality and description and in such good repair, order and condition as the same are at the beginning of, or may be put in during, the term, damage by fire or other unavoidable casualty and reasonable wearing and use only excepted, the Lessee acknowledging that the aforesaid are now in good repair, order and condition; and will conform to all reasonable rules and regulations now or hereafter established by the Lessor for the care and use of the building and its facilities and approaches; and will not carelessly use or neglect the elevators, or obstruct with furniture, merchandise, rubbish or otherwise the skylights or windows in the demised premises or said building, or the entryways, elevators wells or staircases used in common with other occupants of said building; and will not permit employees to loiter about or obstruct the sidewalks, entryways or stairways, nor do or permit anything to be done on the premises which will in any way interfere with the rights of other tenants, if any, or conflict with the laws relating to fires, drains or plumbing, or the rules or ordinances of the city of Boston; and will keep the sidewalks adjacent to the demised premises free from snow and ice and all openings in the sidewalks in good repair; and at the expiration of the said term will remove the Lessee's goods and effects and those [fol. 10] of all persons claiming through or under the Lessee; and will peaceably yield up to the Lessor the demised premises, and all erections and additions made to or upon the same, in good repair, order and condition in all respects, damage by fire or other unavoidable casualty and reasonable wearing and use only excepted; and will hold the Lessor harmless and indemnified against any and all injury, loss or damage from any cause to any person or property upon or about the demised premises or while in transit thereto or therefrom upon the hallways, stairways,

elevators or other approaches to the demised premises; and will from time to time promptly and at the expense of the Lessee make such alterations and additions in and to the demised premises and do all such other things therein as may be required of the Lessee or of the Lessor by any laws, ordinances, regulations or orders of the Boston Board of Fire Underwriters or of any public authority applicable to the demised premises or to the use, occupation or maintenance of the same so that the demised premises shall conform thereto and be used, occupied and maintained in conformity therewith, and will save the Lessor harmless and indemnified from all cost and expense of any alterations or additions in or to any portions of said building not hereby demised and of other things so required because of the Lessee's use or occupation of the demised premises; and that during the said term, and such further time as aforesaid the demised premises or the hallways stairways, elevators or other approaches thereto or to said building, or any fixtures therein or used therewith shall not be overloaded, damaged or defaced; and no trade or occupation shall be [fol. 11] carried on upon the demised premises, or use made thereof which shall be unlawful, improper, noisy or offensive, or contrary to any law of the Commonwealth or ordinance or by-law for the time being in force of the City of Boston, or injurious to any person or property; and no act or thing shall be done upon the demised premises, which may make void or voidable any insurance of the demised premises or building against fire, or may render any increased or extra premium payable for any such insurance; and no addition or alteration to or upon the demised premises shall be made without the consent in writing of the Lessor; and that the Lessor, or the Lessor's agents, may, during the said term, at seasonable times, enter to view the demised premises, and may remove placards, signs, awnings, and the like not approved and affixed or placed as herein provided, and may show the demised premises and building to others, and at any time within three months next before the expiration of the said term may affix to any suitable part of the demised premises a notice for letting or selling, and keep the same so affixed without hindrance or molestation; and may enter the demised premises to examine any machinery, gas, water or steam pipes, or fixtures, or electric wires and fixtures (whether used in con-

nection with the demised premises or with other premises) and may maintain, repair and protect the same and may introduce additional machinery, pipes, wires or fixtures if the Lessor should elect so to do, and may make any repairs, alterations or additions which the Lessor may desire, but the Lessor is not to be required to make any repairs, alterations, additions, improvements or replacements of any kind [fol. 12] unless the Lessor elects so to do, and is not to be held to any covenant, agreement or representation, express or implied, that the demised premises are or will continue to be suited or fit for any particular use; and that any notice from the Lessor to the Lessee relating to the demised premises, or the occupancy thereof, shall be deemed duly served if left at the demised premises addressed to the Lessee.

Provided always that in case the demised premises or any part thereof, or the whole or any part of the building of which they are a part shall be taken for any street or other public use, or shall be destroyed or damaged by fire or other unavoidable casualty or by the action of the City or other authorities, or shall receive any direct or consequential damage for which the Lessor and/or the Lessee shall be entitled to compensation by reason of anything lawfully done in pursuance of any public authority, after the execution hereof and before the expiration of the said term, then this lease and the said term shall terminate at the election of the Lessor, and such election may be made in case of any such taking, notwithstanding the entire interest of the Lessor may have been divested by such taking; and if the Lessor shall not so elect, then in case of any such taking or destruction of, or damage to, the demised premises, rendering the same or any part thereof unfit for use and occupation, a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the demised premises, shall be suspended or abated until the demised premises, or in case of such taking, what may [fol. 13] remain thereof, shall have been put in proper condition for use and occupation. The Lessor reserves and excepts from this lease all rights to damages to the demised premises or any part thereof or the leasehold hereby created heretofore accrued or hereafter to accrue by reason of the location, construction, maintenance or operation of any railway either above or below the ground, or any elevated structure, or any subway or tunnel for such or any

other purpose, and by way of confirmation of the foregoing the Lessee hereby grants all rights to such damages heretofore accrued or hereafter accruing during the term or any extension thereof to the Lessor, to have and to hold to the Lessor and the Lessor's heirs and assigns forever.

Provided also, and these presents are upon this condition, that if the Lessee shall neglect or fail to perform or observe any of the covenants contained in these presents, and on the Lessee's part to be performed or observed or if the estate hereby created shall be taken on execution, or by other process of law, or if any assignment shall be made of the Lessee's property for the benefit of creditors, or if a receiver, guardian, conservator or other similar officer shall be appointed to take charge of any property of, or to wind up the affairs of, the Lessee, then, and in any of the said cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance) the Lessor lawfully may, immediately or at any time thereafter, without demand or notice, enter into [fol. 14] and upon the demised premises or any part thereof in the name of the whole and repossess the same as of the Lessor's former estate, and expel the Lessee and those claiming through or under the Lessee and remove the effects of both or either (forcibly, if necessary) without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the Lessee covenants that in case of such termination, or in case of termination under the provisions of statute by reason of default on the part of the Lessee, the Lessee will pay to the Lessor as damages such a sum as at the time of such termination represents the difference between the rental value of the demised premises and the rent and other payments herein named for the remainder of the said term; and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of

this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term.

[fol. 15] The Lessor gives the Lessee permission to install, at Lessee's expense a show case between the entrance of the above premises and #104 Hanover Street, subject to the Rules and Ordinances of the City of Boston, Mass., and any other Public Authorities. The design to be approved by the Lessor.

The Lessor reserves the right to terminate this lease at any time after November 14, 1933, by giving the Lessee six months (6 mos.) notice in writing mailed to or delivered at his last known address, and in case of such termination by the Lessor, he will pay the Lessee a cash bonus of thirty-five hundred (3500) dollars on surrender of the premises to him or his agent.

The provision for the payment of a cash bonus shall be null and void in case the Lessee commits any breach of the terms, conditions or covenants of this lease.

It is agreed and understood that the Lessor and the Shareholders of Real Estate Associates are not to be personally liable hereunder, it being understood that the Trust Estate only is to be found.

It is agreed and understood that the said premises are to be used for the sale of men's hats, etc., but not for the sale of men's clothing.

Where the context so admits, the term "Lessor" shall include agents, heirs, successors and assigns, and the term "Lessee" shall include legal representatives, successors and assigns. The convenants of the Lessee shall be the joint and several obligations of each party signing as Lessee and, when the Lessees are partners, shall be the obligations of the firm and of the individual members thereof.

[fol. 16] In witness whereof, the said parties have hereunto and to a duplicate hereof set their hands and common seal the day and year first above written.

The Trustees of the Real Estate Associates, by Ingersoll Bowditch, Trustee. Sarnoff-Irving Hat Stores, Inc., by Simon Sarnoff, President. (Seal.)

In consideration of the execution of the foregoing lease by the Lessor at the request of the undersigned and of one dollar in hand paid, the undersigned hereby guarantee the punctual payment of the rent and the performance of all the covenants and agreements on the Lessee's part in said lease, demand and notice of default or of non-payment being hereby waived.

Witness — hand and seal the day and year first written in the foregoing lease.

The Trustees of Real Estate Associates, by Ingersoll Bowditch, Trustee. Sarnoff-Irving Hat Stores, Inc., by Simon Sarnoff, President. (Seal.)

At a meeting of the Directors of Sarnoff-Irving Hat Stores, Inc., duly called and held at 419 Lafayette St., [fol. 17] N. Y. C., on Nov. 11, 1925, the following vote was passed; Voted, that Simon Sarnoff be authorized to execute a lease under seal from The Trustees of the Real Estate Ass. of Boston, Mass., upon such terms and with such covenants as to him may seem fit.

Attest:

S. L. Ruzon, Secretary.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED PROOF OF CLAIM

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At the above District in the County of Suffolk, Commonwealth of Massachusetts, on the date hereinafter set forth, came Ingersoll Bowditch and makes oath and says:

I am one of the Trustees of the Real Estate Associates, a voluntary association having its usual place of business [fol. 18] at Boston in said County of Suffolk and said Commonwealth; I reside in said Boston; I am duly authorized

to make this proof of claim on behalf of myself, Stephen W. Sleeper and Francis H. Appleton, Jr., as Trustees of said Real Estate Associates, and as such trustees we are the claimants; the above named bankrupt was at and before the time of the filing of the petition in bankruptcy herein and still is, justly and truly indebted to the claimants in the sum of Ten Thousand Six Hundred Sixty-seven and 68/100 Dollars ($10,667.68); the consideration of said debt is rent of and charges for electricity consumed at the store numbered 102 Hanover Street in said Boston under the terms of Indenture of Lease dated November 7, 1925, annexed to the original proof of claim filed by said Trustees in said bankruptcy matter, and for liquidated damages for breach of covenant contained in said Indenture of Lease, namely:

"and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue [fol. 19] of the term hereof, less the fair rental value of the demised premises for the residue of said term."

that the annexed statement marked "Exhibit A" sets forth in full the amount of the claimants' claim for which this proof is made; no part thereof has been paid; there are no offsets or counterclaims thereto; the claimants have not nor has any person for or on behalf of the claimants, or to the deponent's knowledge or belief, had or received, for the use or benefit of the claimants, any security for said debt; no judgment has been rendered therefor or for any part thereof; no note or other evidence of said debt has been received.

In executing and filing this proof of claim, the claimants in no way waive any rights which the claimants may have to reclaim specific assets and expressly reserve such rights.

Trustees of The Real Estate Associates, by Ingersoll Bowditch.

Subscribed, sworn to and acknowledged before me this 29th day of March, 1934, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

Clarence M. Loud, Notary Public.

[fol. 20] EXHIBIT "A" TO AMENDED PROOF OF CLAIM

Item #1

The item for rents and deficiencies accrued prior to bankruptcy is computed as follows:

Date	Rent due	Period of interest to date of bankruptcy Aug. 27, 1932	Interest at 6%	Total
Mar. 1 to Apr. 27, 1932....	$1,108.34	5 mos. 27 days	$32.24	$1,140.58
Apr. 27 to July 17, 1932....		Receiver occupied premises and duly paid for occupancy.		
July 18 to July 31, 1932....	104.33	13 days	.71	105.04
Aug. 1 to Aug. 27, 1932....	225.00	27 days	1.00	226.00
	$1,437.67		$33.95	$1,471.62

Item #2

The following are deficiencies accruing subsequent to the date of bankruptcy, less the discounts:

Monthly rent reserved under lease, payable in advance.....	$583.33
Fair rental value at $4,000 per year, in monthly installments.....	333.33
Difference monthly.....	$250.00

Due date	Difference between rent and rental value	Period of discount from date of bankruptcy, Aug. 27, 1932		Discount at 6%	Balance-damage
1932.					
Sept. 1.....	$250.00		4 days	$ .18	$ 249.82
Oct. 1.....	250.00	1 mo.	3 "	1.37	248.63
Nov. 1.....	250.00	2 mos.	4 "	2.68	247.32
Dec. 1.....	250.00	3 "	3 "	3.98	246.02
1933.					
Jan. 1.....	250.00	4 "	4 "	5.19	244.81
Feb. 1.....	250.00	5 "	4 "	6.46	243.54
Mar. 1.....	250.00	6 "	1 "	7.61	242.39
Apr. 1.....	250.00	7 "	4 "	8.76	241.24
May 1.....	250.00	8 "	3 "	10.12	239.88
June 1.....	250.00	9 "	4 "	11.39	238.61
July 1.....	250.00	10 "	3 "	12.63	237.37

[fol. 21] Due date	Difference between rent and rental value	Period of discount from date of bankruptcy, Aug. 27, 1932	Discount at 6%	Balance-damage
Aug. 1.....	250.00	11 " 4 "	13.90	236.10
Sept. 1.....	250.00	12 " 4 "	15.18	234.82
Oct. 1.....	250.00	1 yr. 3 "	16.37	233.63
Nov. 1.....	250.00	1 " 1 mo. 4 "	17.68	232.32
Dec. 1.....	250.00	1 " 2 mos. 3 "	18.98	231.02
1934.				
Jan. 1.....	250.00	1 " 3 " 4 "	20.19	229.81
Feb. 1.....	250.00	1 " 4 " 4 "	21.46	228.54
Mar. 1.....	250.00	1 " 5 " 1 "	22.61	227.39
Apr. 1.....	250.00	1 " 6 " 4 "	23.76	226.24
May 1.....	250.00	1 " 7 " 3 "	25.12	224.88
June 1.....	250.00	1 " 8 " 4 "	26.39	223.61
July 1.....	250.00	1 " 9 " 3 "	27.63	222.37
Aug. 1.....	250.00	1 " 10 " 4 "	28.90	221.10
Sept. 1.....	250.00	1 " 11 " 4 "	30.18	219.82
Oct. 1.....	250.00	1 " 12 " 3 "	31.37	218.63
Nov. 1.....	250.00	2 yrs. 4 "	32.68	217.32
Dec. 1.....	250.00	2 " 1 " 3 "	33.98	216.02
1935.				
Jan. 1.....	250.00	2 " 2 " 4 "	35.19	214.81
Feb. 1.....	250.00	2 " 3 " 4 "	36.46	213.54
Mar. 1.....	250.00	2 " 4 " 1 "	37.61	212.39
Apr. 1.....	250.00	2 " 5 " 4 "	38.76	211.24
May 1.....	250.00	2 " 6 " 3 "	40.12	209.88
June 1.....	250.00	2 " 7 " 4 "	41.39	208.61
July 1.....	250.00	2 " 8 " 3 "	42.63	207.37
Aug. 1.....	250.00	2 " 9 " 4 "	43.90	206.10
Sept. 1.....	250.00	2 " 10 " 4 "	45.18	204.82
Oct. 1.....	250.00	2 " 11 " 3 "	46.37	203.63
Nov. 1.....	250.00	2 " 12 " 4 "	47.68	202.32
Dec. 1.....	250.00	3 " 3 "	48.98	201.02
	$10,000.00		$981.02	$9,018.98

Item #3

Charges for electricity furnished to and consumed at said premises from February 20 to April 27, 1932, in accordance with the provisions of said lease	$173.61
Interest at 6% to Aug. 27, 1932	3.47
Total	$177.08

[illegible] ruptcy	$ 1,471.62
Total of Item #2—Deficiencies accruing subsequent to the date of bankruptcy, less discounts	9,018.98
Total of Item #3—Charges for electricity furnished to and consumed at said premises from February 20 to April 27, 1932, and interest	177.08
Grand Total	$10,667.68

[fol. 22] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF HEARING

To Ingersoll Boditch, Esq., % Burt Franklin, Attorney for Real Estate Associates, 500 Fifth Avenue, New York City.

Please take notice that a hearing will be had before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, at his office, 280 Broadway, Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 27th day of March, 1934, at 12:00 noon of said day, on the objection filed by Irving Trust Company, as Trustee in Bankruptcy herein, to the claim of Real Estate Associates, filed in the sum of $4418.04.

Please take further notice that the undersigned will move the Court at that time for an order reducing the said claim of Real Estate Associates from the sum of $4418.04 to the [fol. 23] sum of $1086.27, as a general claim herein.

Dated New York, March 16th, 1934.

Yours, etc., McManus, Ernst & Ernst, Attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc. Office & P. O. address: 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

EXTRACT FROM MINUTES OF HEARING

Mr. Melzer: Next is the claim of the Real Estate Associates.

This claim has been filed in the sum of $4,418.04, to which I have filed an objection on the ground that the amount of the indebtedness due was but the sum of $1,086.27.

Here, again, we have a lease, which I think comes within the provisions of the case of the Outfitters Realty Operating Company, Inc., decided by Judge Learned Hand.

The lease provides—the damage clause provides—that upon a breach the landlord may immediately sue for the difference between the re-rental value and the rental reserved for the period involved.

[fol. 24] I understand and I have been told by the Attorneys who appear for the Real Estate Associates that they desire to make an amendment to their claim, and I wish to give them an opportunity now to make their motion.

Mr. Franklin: Since the original filing of this claim we discovered that there is an error in computing the amount to be due. The original claim recites that the lease called for a rental of $5,000 per year. The lease which was attached to the original claim, however, recites that the rental was $7,000 per year. Now, apparently the error was caused by virtue of the fact that the Real Estate Associates had been involuntarily accepting rent at the rate of $5,000 per year, two, three, or four months just prior to the bankruptcy, and when this matter came to the attention of the Trustees of the Real Estate Associates in Boston, upon looking at the records, instead of the lease, they computed their damages at the rate of $5,000 per year instead of $7,000 per year. So, we desire to amend the claim to take up that difference between the $5,000 and $7,000 a year.

Mr. Melzer: Insofar as the question of law is concerned, as to what the amount of the legal indebtedness would have been, if they had originally filed their claim for that amount, I think they could have filed the claim based on the lease reserving a rental of $7,000 per year, as the rent reduction which was agreed upon was one without consideration.

The only question is whether or not your Honor will now permit them, after the expiration of the statutory period, to amend their claim by increasing the amount and chang-

[fol. 25] ing the original claim. That is something which I leave solely to the discretion of your Honor.

Mr. Franklin: Your Honor, the substance of it is in the record; the lease itself is in the record, and everything upon which we base our claim has always been in the record. It is purely a matter of a mistake which we feel is in your power to correct.

Now, in Re Hamilton Automobile Co., 209 Fed. 596, the Court said—Justice requires that the claim should be amended and allowed in the larger amount than that claim

when it was first presented, but for the same claim or subject matter; amendment allowed.

In Re Patterson McDonald Shipbuilding Company, 292 Fed. 759, Circuit Court of Appeals—Courts are liberal in allowing proofs of claim to be amended and amendments should be allowed where there is enough in the original amendment by which to amend.

In Re Brunswick Carpet Cleaning Company, 4 Fed. 514, the court held—In the absence of fraud it was competent for the Court to correct any mere mistake and to allow the proof to stand for any sum that upon examination was found to be actually due.

Mr. Melzer: I do not contest the allegation in the proof of claim that the reasonable rental value of the premises was at the rate of $4,000 per annum.

The Referee: I will reserve decision.

At 12:30 P. M. Hearing closed.

[fol. 26] In United States District Court, Southern District of New York

[Title omitted]

Memorandum of Referee on Objection to Claim of Real Estate Associates and Motion to Amend Proof of Claim

The motion to amend the proof of claim made by the claimants as to compute their damages at the rate of $7,000 per year instead of $5,000 per year is granted.

In re: Hamilton Automobile Co., 209 Fed. 596;
Brunswick Carpet Cleaning Company, 4 Fed. 514;
Paterson McDowell Shipbuilding Company, 292 Fed. 759.

The trustee withdrawing its objections otherwise to the claim, an order may be submitted on notice of settlement in accordance with the above views.

Dated May 9th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 27] In United States District Court, Southern District of New York

[Title omitted]

Order of Referee

A proof of claim having been filed herein by Real Estate Associates, in the sum of $4418.08, and an objection thereto having been filed by Irving Trust Company, as Trustee in Bankruptcy, upon the ground that the amount of the indebtedness to the said claimant was but the sum of $1086.27,

Now, upon reading and filing the said objection to the claim of Real Estate Associates, and the notice bringing on the same for hearing before the undersigned, and due proof of service thereof and the matter having duly come on for hearing, and it appearing that the claimant having filed an amended proof of claim herein for the sum of $10,667.68, and it further appearing that the amount of the indebtedness of the bankrupt to the claimant at the time of the filing of the petition in bankruptcy herein was the sum of $10,667.68, and after hearing McManus, Ernst & Ernst, Lester D. Melzer, of counsel, attorneys for the Trustee in Bankruptcy, in support of the objections to the said claim, and Franklin & Grady, Burt Franklin, of counsel, attorneys for Real Estate Associates, it is

[fol. 28] Ordered that the amended claim filed herein by Real Estate Associates, in the sum of $10,667.68, be and it hereby is allowed as a general claim herein; and it is further

Ordered that the objections filed by the Trustee in Bankruptcy herein, be and they hereby are dismissed.

Dated, New York, May 15th, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Filing Petition for Review

Sirs: Please take notice that on the 21st day of May, 1934, at 11:00 o'clock A. M., the undersigned will file with

[fol. 29] Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, in charge of the above entitled bankruptcy proceeding, at his office, No. 280 Broadway, Borough of Manhattan, City of New York, a petition for review of the above entitled matter, a copy of which petition is hereto annexed and made a part hereof.

Dated, New York, May 19th, 1934.

Yours, etc., McManus Ernst & Ernst, Attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Office & P. O. Address: 170 Broadway, Borough of Manhattan, New York City.

To: Franklin & Grady, Esqs., Attorneys for Real Estate Associates, 500 Fifth Avenue, New York City.

[fol. 30] In United States District Court, Southern District of New York

[Title omitted]

Petition for Review

To Honorable Oscar W. Ehrhorn, Referee in Bankruptcy:

The petition of Irving Trust Company respectfully represents:

First: That it is the duly qualified and acting Trustee in Bankruptcy herein.

Second: That a proof of claim was filed herein by Real Estate Associates, for the sum of $4418.08, and your petitioner filed an objection to the said claim, upon the ground that the amount of the indebtedness owing to the said claimant was but the sum of $1086.27.

Third: The said Real Estate Associates subsequently filed an amended proof of claim for the sum of $10,667.68, which amendment was allowed by order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, which order also dismissed the objections filed by your petitioner, as Trustee in Bankruptcy, for the said claim.

[fol. 31] Fourth: The said proof of claim was based upon a lease entered into between Real Estate Associates, the

said claimant, as landlord, and the above named bankrupt, as tenant, and the amount of $10,667.68 represents the amounts due the claimant by the bankrupt for past due rent at the time of the filing of the bankruptcy petition, plus the value at the time of the filing of the bankruptcy petition of the difference between the rents reserved in the said lease to the end of the term, and the reasonable re-rental value of the premises during that period.

Fifth: The actual amount due at the time of the filing of the petition in bankruptcy for past due rent was the sum of $1086.27. Your petitioner filed an objection to the claim upon the ground that the additional item representing the difference between the rents reserved to the end of the term, pursuant to the said lease, and the actual rerental value of the said premises, did not represent a provable claim in bankruptcy.

Sixth: A hearing was duly had on the objection to the said claim, and the objections of the Trustee were dismissed and the claim allowed by order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, the said Referee in Bankruptcy, having allowed the said claim upon the authority of Outfitters Operating Realty Co., Inc., Bankrupt, A. W. Perry, Appellant, against Irving Trust Company, Trustee, Appellee, decided by the Circuit Court of Appeals for the Second Circuit.

Seventh: Since the rendition of the decision in this mat-
[fol. 32] ter by Referee Ehrhorn and the entry of the said order, a writ of certiorari has been granted by the United States Supreme Court in the said case of Outfitters Operating Realty Co., Inc., Bankrupt, A. W. Perry, Appellant, against Irving Trust Company, Trustee, Appellee.

Eighth: In view of the granting of the said writ of certiorari by the United States Supreme Court, your petitioner is of the opinion that the United States Supreme Court will reverse the decision of the Circuit Court of Appeals in said case, and that the said Referee in Bankruptcy erred in dismissing the objections filed by your petitioner to the claim of Real Estate Associates, and allowing the said claim in the sum of $10,667.68.

Ninth: That annexed hereto is a copy of the said order entered by Hon. Oscar W. Ehrhorn, Referee in Bank-

ruptcy, dated May 15th, 1934, which your petitioner believes was erroneously granted.

Wherefore, your petitioner respectfully prays that the said order be reviewed and reversed, and that the claim of Real Estate Associates be reduced to the sum of $1086.27, and allowed as a general claim in said sum, and for such other and further relief as to this Court may seem just and proper in the premises, for all of which no previous application has been made.

And your petitioner will ever pray, etc.

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., by (Signed) Joseph T. Stearns, Assistant Secretary.

[fols. 33 & 34] *Duly sworn to by Joseph T. Stearns. Jurat omitted in printing.*

Copy of referee's order omitted, printed side page, 27 ante.

[fol. 35] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF OBJECTION TO CLAIM OF REAL ESTATE ASSOCIATES

To the Honorable the Judges, etc.:

I, Oscar W. Ehrhorn, Referee in Bankruptcy in charge of the above proceeding, do hereby certify:

That in the course of such proceeding, an objection was made to the claim of Real Estate Associates by the Trustee in Bankruptcy, as a result of which a hearing was had and an order was enteerd allowing the claim in the sum of Ten Thousand Six Hundred Sixty-seven and 68/100 Dollars (10,667.68).

That thereafter, the Trusteee in Bankruptcy, feeling aggrieved thereat, has filed with me its petition for review, which was granted.

That the errors complained of are set forth in such petition for review.

Pursuant to the provisions of General Order XXVII, I hereby certify that the question presented is whether the Referee was right in allowing the claim in the amount of [fol. 36] Ten Thousand Six Hundred Sixty-seven and 68/100 Dollars ($10,667.68).

The undersigned Referee respectfully refers to his memorandum herein, dated the ninth day of May, 1934, and to the minutes on which said order was made.

From the testimony it appears (S. M. pp. 7-8) as stated by Lester D. Melzer, Esq., of counsel for Messrs. McManus, Ernst & Ernst, attorneys for the Trustee, that the only question submitted to the undersigned was whether or not, after the expiration of the statutory period, the claimant could amend its claim by increasing the amount. No question was raised as to the fact that under the decision of Outfitters Operating Realty Co., Inc., Bankrupt, A. W. Perry, Appellant v. Irving Trust Company, Appellee (C. C. A. 2d Circuit) the claimant was entitled to the sum in which the claim was allowed by the undersigned.

No question is raised by the petition for review to the amendment of the proof of claim, and the sole basis for objecting to the allowance of the claim in the amount stated at this time is because it appears now that a Writ of Certiorari has been granted by the United States Superior Court in the said case of Outfitters Operating Realty Co., Inc., Bankrupt, A. W. Perry, Appellant v. Irving Trust Company, Appellee.

I hand up herewith for the information of the Judges the following papers:

1. Proof of Claim $4,418.08, filed September 10, 1932 (original lease attached);

2. Notice of objection by Trustee, filed May 2, 1933;

[fol. 37] 3. Notices of hearing filed October 17, 1933 and March 20, 1934;

4. Stenographers' minutes, pages 7-9, hearing April 5, 1934;

5. Amended proof of claim, Real Estate Associates, $10,667.68, filed April 19, 1934;

6. Memorandum of Referee, dated May 9, 1934 (allowing amendment);

7. Order allowing claim at $10,667.68, dated May 15, 1934;

8. Petition for review by Trustee. filed May 21, 1934.

Pursuant to the practice adopted, I direct that the hearing on this certificate be had before the Honorable District Judge holding the Bankruptcy Part on Wednesday, June 13, 1934, at 10:30 A. M.

I certify that copies of this certificate have been mailed to the following parties:

Messrs. McManus, Ernst & Ernst, 170 Broadway, New York, New York, Attorneys for Trustee.

Messrs. Franklin & Grady, 500 Fifth Avenue, New York, New York, Attorneys for Real Estate Associates.

Dated, New York, June 5, 1934.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 38] IN UNITED STATES DISTRICT COURT

MEMORANDUM, COXE, D. J.

At the argument of this motion it was agreed by all counsel that the case was ruled by Outfitters Operating Realty Co. vs. Irving, recently decided by the C. C. A. in this Circuit (Certiorari granted by the Supreme Court) and the petition to review is therefore denied so that the question may, if possible, be presented to the Supreme Court at the time the Outfitters case is heard.

Alfred C. Coxe, D. J.

June 13, 1934.

IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 55118

Re Claim of Real Associates

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt

ORDER APPEALED FROM—June 14, 1934

A motion having been duly made upon behalf of Ingersoll Bowditch, Stephen W. Sleeper and Francis H. Apple-

[fol. 39] ton, Jr., as Trustees of the Real Estate Associates, for an order dismissing the petition of Irving Trust Company, as Trustee in Bankruptcy herein, verified the 19th day of May, 1934, and filed in the office of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, on the 21st day of May, 1934, for a review of the order of the said Referee, dated May 15, 1934, allowing the amended claim filed herein by Real Estate Associates, in the sum of $10,667.68, as a general claim herein, and dismissing the objections filed thereto by Irving Trust Company, as Trustee in Bankruptcy herein, and after hearing Franklin & Grady, Burt Franklin, of counsel for Ingersoll Bowditch, Stephen W. Sleeper and Francis H. Appleton, Jr., as Trustees of the Real Estate Associates, the claimant in support of the said motion, and McManus, Ernst & Ernst, attorneys for Irving Trust Company, as Trustee in Bankruptcy, Lester D. Melzer, of counsel, in opposition thereto, it is, on motion of Franklin & Grady, attorneys for Ingersoll Bowditch, Stephen W. Sleeper and Francis H. Appleton, Jr., as Trustees of the Real Estate Associates,

Ordered that said order entered herein by Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, be and it hereby is in all respects approved and confirmed; and it is further

Ordered that said petition filed herein on May 21st, 1934, for a review of said order, be and it hereby is denied.

Alfred C. Coxe, U. S. D. J.

[fol. 40] Notice of settlement of the foregoing order is hereby waived.

McManus, Ernst & Ernst, Attorneys for Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the undersigned hereby appeals to the United States Circuit Court of Appeals for the

Second Circuit, from the order entered in the office of the Clerk of the United States District Court for the Southern District of New York, on the 14th day of June, 1934, confirming the order of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, allowing the amended proof of claim filed herein by the Real Estate Associates, [fol. 41] in the sum of $10,667.68, and dismissing the objections filed thereto by Irving Trust Company, as Trustee in Bankruptcy herein, and from each and every part of said order.

Dated, New York, June 14th, 1934.

Yours, etc., Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Petitioner, by McManus, Ernst & Ernst, Attorneys for Petitioner, Office & Post Office Address: 170 Broadway, Borough of Manhattan, New York City.

To Franklin & Grady, Esqs., Attorneys for Real Estate Associates, Claimant, 500 Fifth Avenue, New York City.

[fol. 42] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., feeling itself aggrieved by the order entered in the above entitled proceeding in the office of the Clerk of this Court, on the 14th day of June, 1934, confirming the order of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, allowing the amended proof of claim filed herein by the Real Estate Associates, in the sum of $10,667.68, and dismissing the objections filed thereto by Irving Trust Company, as Trustee in Bankruptcy herein, does hereby appeal from said order and from each and every part thereof, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays for an order allowing the said petitioner to prosecute said appeal, and that a transcript of the

record and proceedings on which said order is made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit, and that a citation [fol. 43] be issued directed to the Real Estate Associates commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain in justice to be done in the premises.

Dated, New York, June 14th, 1934.

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., by McManus, Ernst & Ernst, Attorneys for Petitioner, Office & Post Office Address: 170 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

The foregoing appeal from the order entered herein on the 14th day of June, 1934, be and the same hereby is allowed.

Dated, New York, June 14th, 1934.

Alfred C. Coxe, U. S. D. J.

[fol. 44] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., feeling itself aggrieved by the order entered herein on June 14th, 1934, now appears by its attorneys and presents with its notice of appeal, the following assignment of errors:

First: That the Court erred in confirming the order of Honorable Oscar W. Ehrhorn, Referee, in Bankruptcy, dated March 15th, 1934, allowing the amended proof of

claim filed herein by the Real Estate Associates, in the sum of $10,667.68.

Second: That the Court erred in confirming the order of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, dated May 15th, 1934, dismissing the objections filed by Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., to the proof of claim of the Real Estate Associates.

Third: That said order was and is erroneous, in that it was and is contrary to the law.

[fols. 45 & 46] Wherefore, petitioner prays that the said order be reversed, and that the District Court of the United States for the Southern District of New York be directed to enter an order reversing its order and reversing the decision of the Referee, and disallowing the amended proof of claim filed herein by Real Estate Associates.

Dated New York, June 14th, 1934.

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Petitioner, by McManus, Ernst & Ernst, Attorneys for Petitioner. Office & Post Office address: 170 Broadway, Borough of Manhattan, New York City.

Citation in usual form omitted in printing.

[fol. 47] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated June 20, 1934.

McManus, Ernst & Ernst, Attorneys for Appellant.
Franklin & Grady, Attorneys for Appellee.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 490

Argued June 20, 1934. Decided June 20, 1934

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt; IRVING TRUST COMPANY, as Trustee, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand and Swan and A. N. Hand, Circuit Judges

DECISION

Order affirmed in open court.

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of SARNOFF-IRVING HAT STORES, INC., Bankrupt; IRVING TRUST COMPANY, as Trustee, etc., Appellant

ORDER FOR MANDATE—Filed June 27, 1934

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 22, on Monday, November 5th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,801. U. S. Circuit Court of Appeals, Second Circuit. Term No. 173. Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt, Petitioner, vs. Ingersoll Bowditch, Stephen W. Sleeper and Francis H. Appleton, Jr., Trustees of the Real Estate Associates. Petition for a writ of certiorari and exhibit thereto. Filed July 12, 1934. File No. 173, O. T., 1934.

FILE COPY

FILED

JUL 12 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-LEVING HAT STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRVING L. EISNER,

Counsel for Petitioner.

CONTENTS.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for allowance of writ	4
Motion to advance	7
Brief in support of petition	9
Opinions below	9
Jurisdiction	10
Statement of facts	10
Specification of errors	10
Statute governing proof in bankruptcy	11
Argument	11
Conclusion—A writ of certiorari should issue	13

CITATIONS.

A. W. Perry, Inc., v. Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., 69 Fed. (2d) 90	3
Manhattan Properties, Inc., v. Irving Trust Co., Trustee in Bankruptcy of Oliver A. Olsen Co., Inc., 54 S. Ct. 385	4, 5, 12
Maynard v. Elliott, 283 U. S. 273	5
Wm. Filene's Sons Co. v. Weed, 245 U. S. 597	4

STATUTES.

Bankruptcy Act of 1898 (30 Stat. 562), as amended (U. S. C. A., Title 11)	11
Sec. 1 (U. S. C. A., Title 11, Sec. 1)	11
Sec. 17 (U. S. C. A., Title 11, Sec. 35)	11
Sec. 63 (U. S. C. A., Title 11, Sec. 103)	11
Judicial Code, Sec. 240 (a), as amended (U. S. C. A., Title 28, Sec. 347 (a))	10

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT,
Petitioner,
vs.
INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

PETITION FOR WRIT OF CERTIORARI AND MOTION TO ADVANCE.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits its petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of Matter Involved.

On November 7, 1925, the respondents leased to the bankrupt, Sarnoff-Irving Hat Stores, Inc., premises at No. 102 Hanover Street, Boston, Massachusetts, for the term of ten (10) years beginning January 1, 1926, and ending December 31, 1935, at a rental of Six Thousand Five Hundred Dollars ($6,500) per annum for the first five (5) years and Seven Thousand Dollars ($7,000) per annum for the last five (5) years (R. 6 *et seq.*)

Said lease contained the following clause (R. 14):

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term."

The bankrupt was adjudicated in the United States District Court for the Southern District of New York, on August 27, 1932, on a voluntary petition filed on that date.

The respondents filed a claim which (as amended) sought to prove the following items:

(a) Rents which had become due prior to August 27, 1932 (date of petition filed plus interest to that date	$1,471.62
(b) Charges for electricity furnished prior to date of petition, with interest to that date	177.08
(c) Amount of damages under said quoted clause of the lease, to wit, the difference between the amount of the rent reserved in the lease for the residue of the term ($7,000 per year), and the fair rental value of said premises for the residue of the term (which was taken at $4,000 per year), discounted at 6% for the period from date of bankruptcy, August 27, 1932, to the respective due dates (see computation R. 20-21)	9,018.98
Total claim	$10,667.68

Said claim was allowed in full by the Referee on May 15, 1934 (R. 27-28). This order was affirmed by the United States District Court (Coxe, J.) June 14, 1934 (R. 38-39). It was again affirmed by the United States Circuit Court of Appeals for the Second Circuit on June 27, 1934.

The action of the Referee, in allowing the said item of damages, was based upon the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *A. W. Perry, Inc.,* v. *Irving Trust Company, Trustee of Outfitters Operating Realty Co., Inc.,* decided February 13, 1934 (69 F. (2d) 90) (R. 31, 36). Petition for writ of certiorari in said *Outfitters Operating Realty Co.* case was granted by this Court on May 14, 1934, and is now pending before this Court (Docket No. 22, October Term, 1934).

The Memorandum by District Judge Coxe indicates that his affirmance of the Referee's order was also based upon the decision in said *Outfitters Operating Realty Co.* case and indicates further that the instant case was expedited by him "so that the question may if possible be presented to the Supreme Court at the time the *Outfitters* case is heard."

Thus the Circuit Court of Appeals has held in the instant case, as in said *Outfitters Operating Realty Co.* case that, where the termination of the lease is co-incident with the filing of the petition in bankruptcy, and where the lease contains provision for damages equal to the difference between the rent reserved in the lease for the residue of the term and the fair rental value of the premises for the same period, the landlord's claim is provable, provided "the series of installments, each made up of the rent reserved less the fair rental value for that period", be discounted at 6 per cent, and that such discount saves the clause from the objection that it provides a penalty.

Reasons Relied on for Allowance of Writ.

1. The provision in the lease in the instant case is in every material respect identical with that in the *Outfitters Operating Realty Co.* case above referred to, and the decision of the Circuit Court of Appeals upon the legal question is likewise identical in both cases. Every reason, therefore, which was asserted in the petition to this Court for certiorari in the *Outfitters* case is likewise present in this case. They may be summarized as follows:

(a) That, while the *Manhattan Properties* case (54 S. Ct. 385, decided February 5, 1934) held that claims for future rent and indemnity provisions, dependent on re-entry by the landlord, are not provable, the question remains undetermined whether a provable claim may exist where the lease provides for termination *ipso facto* upon filing of petition in bankruptcy and contains an agreement for damages effective upon such termination.

(b) That the decision of the court below allowing proof in such case is against the trend of this Court's decisions and disregards language used in the *Manhattan Properties* decision.

(c) That the decision below has therefore created an exception to the established rule that claims for future rent are not provable; that it is important to the business world to know whether this exception is valid; and that this cannot be definitely known until this Court has spoken.

(d) That the decision below is in conflict with other decisions of this Court, in that the promise contained in the clause now in question sounds as a penalty rather than as a promise to pay liquidated damages.

(e) That the measure of damages fixed in this clause is not the same as in *Wm. Filene's Sons Company* v. *Weed,*

245 U. S. 597, 602, because the clause in that case merely required determination of "rental value at the date of entry" which is reasonably susceptible of determination, whereas the clause in the instant case requires determination of the rental value as of the due date of each of the several installments of rent; that this cannot be done and that the case is therefore one where "the contingency * * * (is) such as to make any valuation of the claim impossible," within the condemnation of this Court in *Maynard* v. *Elliott,* 283 U. S. 273, 278.

(f) That the case presents not only the problem whether such a clause can give rise to a provable claim but also, if it can, "what circumscription should be written to avoid the faults of penalty, conjecture and uncertainty"; that there are many other cases even now pending, which involve this type of clause, in some of which damages in large amounts are claimed; and that this Court, by exercising jurisdiction, will be able to dispose of the entire subject and supply the business world with a rule of certainty for its guidance.

2. Your petitioner earnestly desires opportunity to present, by oral argument in this case, certain important considerations of law and practice, some of which may not be presented in said *Outfitters* case, leading to the conclusion that the clause in question is not effective to create a claim provable in bankruptcy and indicating that the decision of the court below is inconsistent with the decision of this Court in the *Manhattan Properties* case and with other applicable decisions of this Court, as well as with the consistent line of decisions heretofore in the various circuits. Such opportunity cannot be had unless this case can be heard and argued before this Court substantially at the same time as said *Outfitters* case.

WHEREFORE your petitioner respectfully prays:

1. That a writ of certiorari issue out of and under the seal of this Honorable Court to review the decree of the Circuit Court of Appeals for the Second Circuit in the above case.

2. That the decree of said Circuit Court of Appeals for the Second Circuit in the above case be reversed.

3. For such other and further relief in the premises as to this Honorable Court may seem proper.

IRVING TRUST COMPANY,
As Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Petitioner,
By JOSEPH T. STEARNS,
Assistant Secretary.
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT,
Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

MOTION TO ADVANCE CASE FOR ARGUMENT.

And now comes Irving Trust Company, as it is Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc. and respectfully moves that, in case its petition for writ of certiorari in the above-entitled case shall be granted by this Honorable Court, this case be advanced and assigned for argument with said case of *Irving Trust Company as Trustee in Bankruptcy of Outfitters Operating Realty Co. Inc.* v. *A. W. Perry, Inc.*, No. 22, October Term 1934, or immediately thereafter.

IRVING TRUST COMPANY,
By JOSEPH T. STEARNS,
Assistant Secretary,
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC.,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Referee is embodied in the Referee's Order (R. 27) and in his Certificate on Petition for Review (R. 35, *et seq.*) and is not reported.

There was no opinion in the District Court. A Memorandum by District Judge Coxe appears at page 38 of the record and his order at pp. 38 and 39. Neither is reported.

There was no opinion in the Circuit Court of Appeals. The Order of said Court, affirming the decision of the District Court, is at p. 49 of the record.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit, which is sought to be reviewed, was entered on June 27, 1934 (R. 49-50).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Sec. 347 (a)).

Statement of Facts.

The facts have been stated in the foregoing petition.

Specification of Errors.

It is submitted that the court below erred:

1. In affirming the decree of the District Court.

2. In holding that the item of damages, as set forth in the respondents' amended proof of claim, set forth a provable debt and should be allowed.

3. In holding that upon the filing of the bankruptcy petition a claim for damages arose under the provisions of the lease which claim was provable in bankruptcy.

4. In holding that the clause in the lease, providing in substance that the filing of a petition in bankruptcy by or against the lessee should be deemed to constitute a breach of the lease and that thereupon, *ipso facto* and without entry or other action by the lessor, the lease should become and be terminated, and that upon such termination the lessor should be entitled to recover of the lessee damages in an amount equal to the amount of the rent reserved in the lease for the residue of the term less the fair rental value of the premises for the residue of the term, was effective to entitle the lessor to prove in said bankruptcy for such damages.

5. In holding that the agreement in said lease, with respect to damages upon termination of said lease by the filing of a petition in bankruptcy, did not sound as a penalty rather than as liquidated damages.

The Statute Governing Proof in Bankruptcy.

The issue turns upon the following Sections of the Bankruptcy Act:

> "Section 63. Debts Which May Be Proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied. * * *
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."
>
> "Section 1. (11) 'Debt' shall include any debt, demand, or claim provable in bankruptcy."
>
> "Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * *"

(Bankruptcy Act of July 1, 1898, as amended, Sections 1, 17, 63; U. S. C. A. Title 11, Section 1, 35, 103.)

ARGUMENT.

Petitioner submits that claims for future rent and claims for damages under covenants, whereby the lessee agrees to indemnify the lessor against loss of rent, have for many years been held not to constitute provable claims. This rule

is supported by many decisions in the District Courts and Circuit Courts of Appeals and has now been affirmed by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 54 S. Ct. 385.

Petitioner further submits that the existence of an agreement in a lease providing that the lease shall terminate upon petition filed, and prescribing a rule of damages in that event, is not sufficient to take this case out of the rule above set out. Petitioner further submits that there is no valid ground for distinction as regards the provability of the landlord's claim between a lease which contains the clause in the instant case for termination *ipso facto* upon petition filed and for consequent damages and a lease which does not contain these provisions.

In view of the fact that the petition for writ of certiorari, which was filed in said case of *Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.* v. *A. W. Perry Inc.,* has heretofore been granted by this Court, petitioner deems it appropriate, in connection with the filing of this petition, not to argue further propositions of law which necessarily relate to the merits of the case. These propositions, it is believed, have been presented sufficiently for present purposes in connection with the petition above referred to in said *Outfitters Operating Realty Company* case which this Court has granted. It is believed this Court will not wish to consider said propositions further at this time or to have them further discussed in connection with this application.

This petition, and the motion to advance for argument with or immediately after said *Outfitters Operating Realty Company* case, are filed with the approval and consent of the respondents, and it is understood formal consent will be filed by them.

Conclusion.

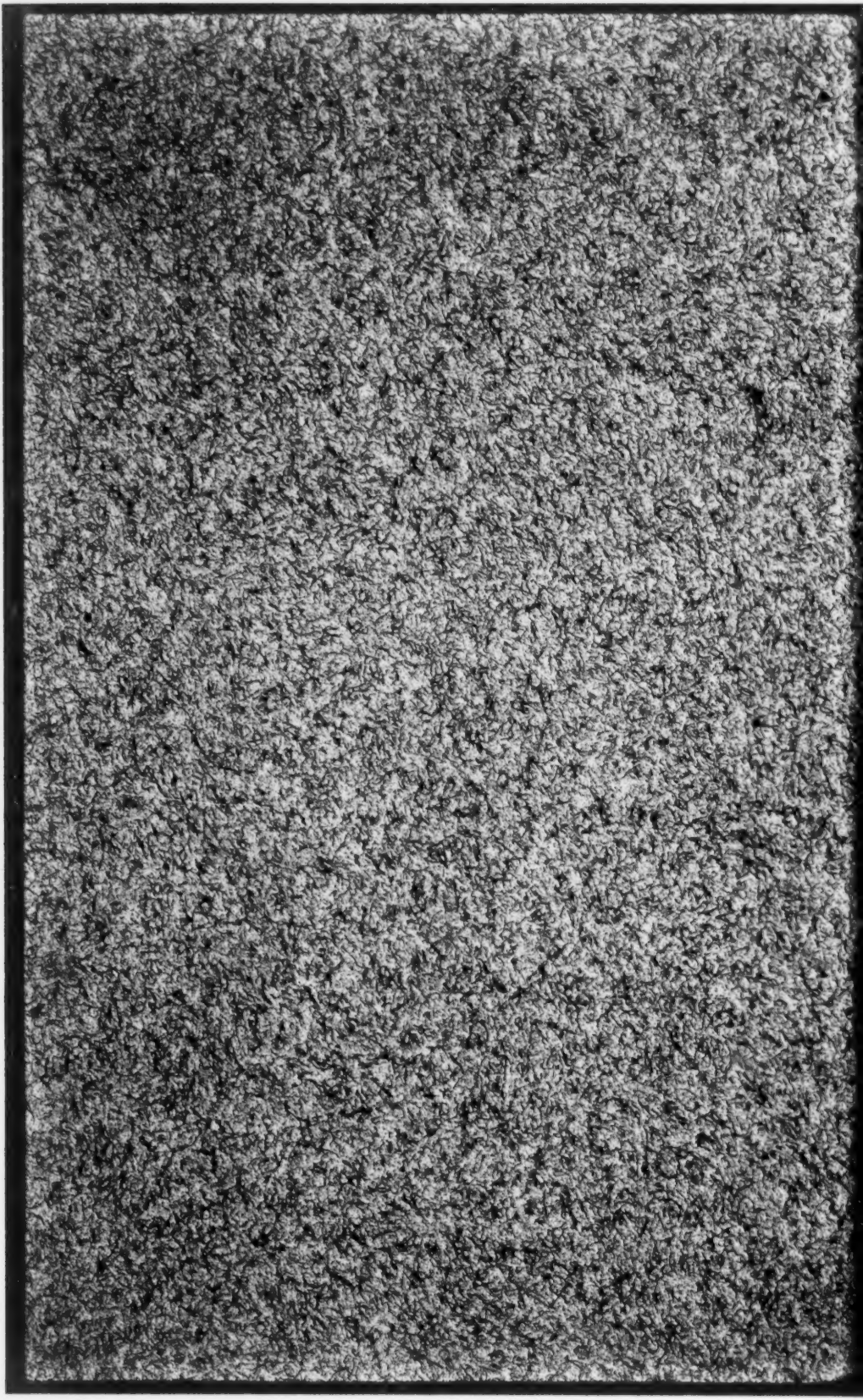
A writ of certiorari should be granted.

Respectfully submitted,

IRVING TRUST COMPANY,
By JOSEPH T. STEARNS,
Assistant Secretary,
IRVING L. ERNST,
Counsel for Petitioner.

July 11, 1934.

(5186-C)



FILE COPY

NOV. 5 193[illegible]
[illegible] STATES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 193[illegible]

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF [illegible] HAL STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE [illegible] ASSOCIATES.

[illegible] OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

[illegible]

INDEX.

Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Statement of facts	2
Question presented	4
Specification of assigned errors to be urged	5
Statutes involved	6
Summary of argument	7

Argument:

I. The controlling factor in determining the provability of claims is whether Congress intended them to be provable. The amendments to the Bankruptcy Act of 1934 are legislative interpretations of the intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act of 1898. These amendments conclusively demonstrate that it was not the intent of Congress in enacting the original statute that a claim such as the present one be provable in bankruptcy 9

A. The intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act as legislatively interpreted by it in enacting Section 77B, sub-section (b), on June 7th, 1934 13

B. The intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act as legislative interpreted by it in amending Section 63 (a) on June 7, 1934, and by the further amendment of June 18, 1934..... 14

(1) The frame of the amendments to Section 63 (a) of June 7, 1934 17

(2) The Act of June 18, 1934, amending Clause (7), enacted June 7, 1934 20

(3) The proceedings in Congress preceding the Act of June 7, 1934 22

II. This Court in Manhattan Properties v. Irving Trust Co., supra, affirmed the doctrine long established by the lower Federal courts that claims for rent or damages consequent upon the abrogation of leases are not provable in bankruptcy. This doctrine is based not upon the language employed in the leases, but the essential nature of such claims 23

Page

III. The prescribed measure of damages is impossible of calculation and sounds in penalty 27

IV. The decision of the Circuit Court of Appeals for the Second Circuit should be reversed and the proof of claim of the respondents reduced to the sum of $1,648.70, representing the rent deficiencies and electric charges with interest thereon due at the time of the filing of the bankruptcy petition.... 32

TABLE OF CASES CITED.

Brown v. Irving Trust Co., 291 U. S. 320..... 9, 10
Central Trust Co. v. Chicago Auditorium Ass'n, 240 U. S. 581..... 23
Cope v. Cope, 137 U. S. 682..... 13
Dunbar v. Dunbar, 190 U. S. 340..... 28, 30
Gardner v. Butler & Co., 245 U. S. 603..... 24
Hermitage v. Levine, 248 N. Y. 333..... 32
In Re Metropolitan Chain Stores, Inc., Malavazos v. Irving Trust Co., 66 Fed. (2d) 482..... 29
In Re Roth & Appel, 181 Fed. 667..... 24
Irving Trust Co. v. A. W. Perry, Inc., 69 Fed. (2d) 90..... 3, 4
Kothe v. Taylor Trust, 280 U. S. 224..... 29
Lane v. Industrial Commissioner, 54 Fed. (2d) 338, certiorari denied on jurisdictional grounds, 286 U. S. 543..... 19
Manhattan Properties v. Irving Trust Co., 291 U. S. 320.....7, 9, 11
Maynard v. Elliott, 283 U. S. 273..... 17
Schall v. Camors, 251 U. S. 239 .....11, 12, 19
Seidlitz v. Auerbach, 230 N. Y. 167 ..... 29, 31
Watson v. Merrill, 136 Fed. 359 26
Wetmore v. Markoe, 196 U. S. 68..... 13

OTHER AUTHORITIES CITED.

Act of June 7, 1934 .....7, 14, 16, 20, 22
Section 63 (a):
Clause 6 ..... 12, 15
Clause 6½ 12, 15
Clause 7 .....12, 15, 16, 22
Section 77B, sub-section (b)..... 7, 13
Act of January 18, 1934 ..... 7, 9
Bankruptcy Act:
Section 1 (11) 6, 7
Section 17 ..... 6, 7
Section 57 (n) 7
Section 63 (a) 7, 13, 14
Clause (1) 6, 17
Clause (2) 6, 17
Clause (3) 6, 17

	Page
Clause (4)	6, 17
Clause (5)	6, 17
Section 63 (b)	6
House Bill No. 5884 (73rd Congress)	22
House Report No. 194 (73rd Congress, First Session)	22
Judicial Code:	
Section 240-a as amended by Act of February 13, 1925 (U. S. C. Title 28, Section 347 (a))	1
Senate Report No. 482 (73rd Congress, Second Session)	22
Senate Report No. 1404 (73rd Congress, Second Session)	21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 173

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF SARNOFF-IRVING HAT STORES, INC., BANKRUPT,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER AND FRANCIS H. APPLETON, JR., TRUSTEES OF THE REAL ESTATE ASSOCIATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

Opinions Below.

No opinions were rendered by the Referee, the District Court, or the Circuit Court of Appeals for the Second Circuit.

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on June 20, 1934, and the

order for mandate filed on June 27, 1934 (R. 28). The jurisdiction of this Court is conferred, pursuant to Section 240 (a) of the Judicial Code (U. S. C. Title 28, Section 347 (a).)

The petitioner's writ of certiorari was granted by this Court on October 8th, 1934 (R. 29).

Statement of Facts.

A lease was entered into between the respondents, as landlord, and Sarnoff-Irving Hat Stores, Inc., the bankrupt, as tenant, dated November 7, 1925, wherein and whereby the respondents leased to the bankrupt certain premises at 102 Hanover Street, Boston, Massachusetts, for a term of ten years from January 1, 1926, at an annual rental of $6500 for the first five years of the term, and $7000 for the last five years, payable in equal monthly installments in advance (R. 4-11).

A voluntary petition in bankruptcy was filed by Sarnoff-Irving Hat Stores, Inc., in the United States District Court for the Southern District of New York, on August 27, 1932, and an order of adjudication in bankruptcy was entered on the same day. The petitioner thereafter duly qualified as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc.

The respondents filed a proof of claim in this bankruptcy proceeding within the statutory six month period, for the sum of $4418.04, of which $3452.76 represented alleged "liquidated damages" for breach of the said lease, and the balance, rent and other charges due at the time of the filing of the bankruptcy petition (R. 1-11). The claim for "liquidated damages" for breach of the lease was based upon the following covenant contained in the lease:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is

> agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 2)

The petitioner objected to the proof of claim (R. 1), and upon the hearing upon the petitioner's objections to the claim, the respondents moved for and obtained leave to file an amended proof of claim (R. 16-17). The amended proof of claim set forth the sum of $10,667.68 as the amount of the bankrupt's indebtedness to the respondents, of which $9018.98 represented alleged rent "deficiencies accruing subsequent to the date of the bankruptcy, less discounts", and the balance of $1648.70, rent and other charges due at the time of the filing of the bankruptcy petition (R. 11-14).

The memorandum of the Referee in Bankruptcy incorrectly states that the petitioner withdrew its objections to the claim (R. 17). The minutes of the hearing reveal that the petitioner admitted that the provability of that portion of the respondents' proof of claim relating to damages for breach of lease was governed by the decision of the Circuit Court of Appeals for the Second Circuit in *Irving Trust Co.* v. *A. W. Perry, Inc.*, 69 F. (2d) 90, and that the Referee was bound by the decision of the Circuit Court of Appeals to dismiss its objections to the claim, and *therefore* the only matter argued at the hearing was the application of respondents for leave to amend their

claim (R. 15-17). This error in the memorandum of the Referee was corrected by the order subsequently entered thereon by him, dated May 15, 1934, which states that the petitioner was heard "in support of the objections to the said claim" and decrees "that the objections filed by the Trustee in Bankruptcy herein, be and they hereby are dismissed." (R. 18.)

The covenant in the lease upon which this claim is based (except the portion thereof for $1648.70, representing rent deficiencies and electric charges with interest thereon due at the time of the filing of the bankruptcy petition) is precisely the same as the one contained in the lease in *Irving Trust Co., as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.*, v. *A. W. Perry, Inc.*, 69 F. (2d) 90, and the petitioner's petition to review the order of the Referee in Bankruptcy was denied by the District Court, per Coxe, D. J., with the following memorandum:

> "At the argument of this motion it was agreed by all counsel that the case was ruled by Outfitters Operating Realty Co. *vs.* Irving, recently decided by the C. C. A. in this Circuit (Certiorari granted by the Supreme Court) and the petition to review is therefore denied so that the question may, if possible, be presented to the Supreme Court at the time the Outfitters case is heard." (R. 23.)

A *pro forma* order of affirmance of this order was entered by the Circuit Court of Appeals for the Second Circuit (R. 28).

Question Presented.

Is a claim by a landlord for damages for breach of a lease of real estate, which has been uniformly held not provable in bankruptcy under Section 63 (a) of the Bankruptcy Act by this Court and the lower Federal courts, made provable by the inclusion in a lease of a provision for its automatic

termination upon the filing of a bankruptcy petition, and the recovery of damages in an amount equal to the rent reserved in the lease for the residue of the term, less the rental value of the premises for that residue?

Specification of Assigned Errors to be Urged.

That the Circuit Court of Appeals erred:

1. In affirming the decree of the District Court.

2. In holding that the item of damages, as set forth in the respondents' amended proof of claim, set forth a provable debt and should be allowed.

3. In holding that upon the filing of the bankruptcy petition a claim for damages arose under the provisions of the lease, which claim was provable in bankruptcy.

4. In holding that the clause in the lease, providing in substance that the filing of a petition in bankruptcy by or against the lessee should be deemed to constitute a breach of the lease and that thereupon, *ipso facto* and without entry or other action by the lessor, the lease should become and be terminated, and that upon such termination the lessor should be entitled to recover of the lessee damages in an amount equal to the amount of the rent reserved in the lease for the residue of the term, less the fair rental value of the premises for the residue of the term, was effective to entitle the lessor to prove in said bankruptcy for such damages.

5. In holding that the agreement in said lease, with respect to damages upon termination of said lease by the filing of a petition in bankruptcy, did not sound as a penalty rather than as liquidated damages.

Statutes Involved.

Section 63 of the Bankruptcy Act, as applicable to this case, provides:

> "Debts Which May Be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

> "'debt' shall include any debt, demand, or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * *,"

with exceptions not here material.

Section 57 (n) provides:

> "Claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication; * * *"

(Act of July 1, 1898, Sections 1, 17, 57 and 63; 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35, 93 and 103.)

Summary of Argument.

I.

It was pointed out by this Court in *Manhattan Properties* v. *Irving Trust Co., supra*, that the issue in determining whether or not a claim is provable is the *intent of Congress* in enacting the Bankruptcy Act. The amendments of June 7, 1934, and June 18, 1934, to the Bankruptcy Act, are legislative interpretations by Congress of its intent in enacting the original Bankruptcy Act of 1898.

The Act of Congress of June 7, 1934, adding to the bankruptcy Act Section 77B, Sub-section (b) of which provides for the treatment of a claim of a landlord for damages or indemnity under a lease covenant, "on a parity with debts which would be provable under Section 63 (a)", and amending Section 63 (a) by the addition of Clause (7), providing for the proof by a landlord of a claim for rent and for damages or indemnity under a lease covenant in a limited amount, indicate that Congress regarded such claims for damages under lease covenants as not originally provable under Section 63 (a).

The amendment of June 18, 1934, amending Clause (7) enacted on June 7, 1934, by limiting the pending estates, to which Clause (7) was applicable, to those "in which the time for filing such claims has not expired", in order to

obviate the inconvenience, expense and confusion which would result from having the clause made applicable to all pending estates, is further conclusive evidence that Congress recognized claims such as the one in the instant case as not having been originally provable under Section 63 (a).

II.

The basis for the denial of proof to the claims in *Manhattan Properties, Inc.*, v. *Irving Trust Co.*, and in the decisions of the lower Federal courts therein adverted to, was not the verbiage employed in the covenants in the leases upon which the claims were filed, but the nature of the claims. The same contingencies which bar the claim for future rent are also present in a claim for damages for breach of lease, in that the measure of damages is necessarily based upon the rent reserved in the lease, the accrual of which is contingent.

III.

The damage clause contained in the covenant of the lease upon which the claim is based is penal in nature and therefore unenforcible. The damage clause, moreover, is not only speculative, but requires the making of an impossible calculation.

ARGUMENT.

I.

The controlling factor in determining the provability of claims is whether Congress intended them to be provable. The amendments to the Bankruptcy Act of 1934 are legislative interpretations of the intent of Congress in originally enacting Section 63 (a) of the Bankruptcy Act of 1898. These amendments conclusively demonstrate that it was not the intent of Congress in enacting the original statute that a claim such as the present one be provable in bankruptcy.

It has recently been held by this Court in *Manhattan Properties* v. *Irving Trust Co.* and *Brown v. Irving Trust Co.*, 291 U. S. 320, that a claim for damages for breach of covenant contained in a lease of real property is not provable. The covenants in the leases in those cases, upon which the claims were sought to be proven, provided:

In the Manhattan Properties case—

That in the event of the institution of bankruptcy proceedings by or against the tenant, the landlord might without notice re-enter the premises, and after obtaining possession, relet as agent for the tenant for the whole or any part of the term, and from time to time, and:

> "The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless

> the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

In the Brown case—

That on default by the lessee, or if it should be adjudicated a bankrupt, the lessor might enter and repossess the premises.

> " • • • and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

The same situation is again presented in this case, and in *Perry* v. *Irving Trust Co.*, 69 F. (2d) 90, which is being argued together with this case, the question being whether the difference in verbiage employed in the covenant of the present lease removes the case from the principle of *Manhattan Properties* v. *Irving Trust Co.* and *Brown* v. *Irving Trust Co., supra.* The clause in the lease containing the covenant upon which the proof of claim in this case is based reads:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, (or either or any of them,) shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be

terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover (of the Lessee and each of them) damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the (demised) premises for the residue of said term." (R. 12.)

(The clause in the Perry case reads identically the same, except that the words in parentheses are omitted.)

This Court in *Manhattan Properties* v. *Irving Trust Co.*, and *Brown* v. *Irving Trust Company, supra*, recognized that the determining factor in permitting or denying proofs of claim in bankruptcy, was not the words employed in the statute, nor was it the verbiage of the covenants of the lease, *but rather the intent manifested by Congress in enacting the Bankruptcy Statute*, stating at pages 332, *et seq:*

"The issue is not one of power, for plainly Congress may permit such claims or exclude them. The sole inquiry is the intent of the Act. The construction for which the petitioners contend is, as a matter of logic, an admissible one. But that construction is contrary to the great weight of authority as to the effect of similar provisions in earlier Acts, and § 63 of the present Act. • • •

"After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors*, 251 U. S. 239, 250, 44 Am. B. R. 547, 38 S. Ct. 578, 64 L. Ed. 247), Congress adopted the Act now in force, that of July 1, 1898. The committee reports do not disclose the origin of the phraseology of § 63, nor discuss the classes of claims intended to be included. But it is clear that Congress was familiar with analogous sections of the earlier acts and the court decisions interpreting them, and with the text of the Lowell Bill and the English act then in force. In view of the extended consideration

and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra,* pp. 250, 251.

"Soon after the passage of the Act several federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under section 63. • • •

"In accord with the well-nigh unanimous view of the federal courts reiterated for over thirty years are statements of leading text writers. *Collier, Bankruptcy,* 13th Ed., Vol. 2, p. 1422; *Remington, Bankruptcy,* Vol. 2, §§ 789, 793; *Loveland, Bankruptcy,* Vol. 1, § 313.

"What of the activities of the Congress while this body of decisions interpreting section 63a, was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 368, 372.

"*In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' Maynard* v. *Elliott, supra,* 277. *If the rule is to be changed Congress should so declare.*" (Italics ours.)

Congress did change the rule (the effective date of the change, however, was subsequent to this case), and permitted the proof of claims in bankruptcy by landlords in a limited amount. These changes were effected by the enactment of a new section to the Bankruptcy Act, relating to the reorganization of corporations, known as Section 77B, and by adding Clauses (6), (6½) and (7) to Section 63 (a). *These amendments to the Bankruptcy Act are legislative interpretations by Congress of its intent in originally en-*

acting Section 63 (*a*). *Cope* v. *Cope,* 137 U. S. 682; *Dunbar* v. *Dunbar,* 190 U. S. 340; *Wetmore* v. *Markoe,* 196 U. S. 68. As stated by this Court in *Cope* v. *Cope, supra:*

> "These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, *but the later Acts should also be regarded as legislative interpretations of the prior ones. United States* v. *Freeman,* 44 U. S. 3 How. 556, 564 (11: 724, 727); *Stockdale* v. *Atlantic Ins. Co.,* 87 U. S. 20 Wall. 323 (22: 348)." (691) (Italics ours.)

The addition of Section 77B to the Bankruptcy Act and the amendments to Section 63 (a) of the Act were enacted on June 7, 1934, subsequent to this Court's decision in *Manhattan Properties, Inc.,* v. *Irving Trust Co., supra.*

A. *The intent of Congress in originally enacting Section* 63 (*a*) *of the Bankruptcy Act, as legislatively interpreted by it in enacting Section 77B, sub-section* (*b*), *on June* 7, 1934.

Section 77B relates only to the reorganization of corporations, but the wording of sub-section (b) thereof is conclusive of Congress' intent in originally enacting Section 63 (a), that a claim such as the present one be not provable thereunder. This sub-section reads:

> "In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. *The claim of a land-*

> *lord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section* 63 (*a*) *of this Act,* but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of re-entry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or re-entry. * * *'' (Italics ours.)

This sub-section permits the filing of all claims provable under Section 63 (a), *plus* "the claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease." By providing that a claim of a landlord for damages for breach of a covenant contained in a lease "shall be treated as a claim ranking on a parity with debts which would be provable under Section 63 (a)," *Congress expressly interpreted claims by a landlord for damages for breach of covenant contained in a lease as not being provable under Section* 63 (*a*).

The amended proof of claim in this case is admittedly for "liquidated damages for breach of covenant contained in said indenture of lease" (R. 12), and in enacting Section 77B of the Bankruptcy Act, Congress legislatively interpreted such a claim as being not provable under Section 63 (a). *Cope* v. *Cope, supra.*

B. *The intent of Congress in originally enacting Section* 63 (*a*) *of the Bankruptcy Act as legislatively interpreted by it in amending Section* 63 (*a*) *on June 7th,* 1934, *and by the further amendment of June* 18*th,* 1934:

The amendment of June 7, 1934, to Section 63 (a) of the Bankruptcy Act dealt with the provability of three classes of claims:

1. Workmen's Compensation claims (Clause 6);

2. Tort claims based upon negligence where an action was instituted prior to the bankruptcy adjudication, although not reduced to judgment at the time of adjudication (Clause 6½); and

3. Claims for future rent, damages and indemnity under covenants contained in leases of real estate (Clause 7).

These clauses provide:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; (6½) the amount of any damages, as evidenced by a judgment of a court of competent jurisdiction, in any action for negligence instituted prior to adjudication of defendant in such action in bankruptcy and pending at the time of the filing of petition in bankruptcy, whether voluntary or involuntary; and (7) *claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date:* Provided, That

> the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided, further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act." (Italics ours.)

The *question presented* is whether these amendments to to Section 63 (a) were merely declaratory of the law as it existed prior to their passage, or whether these amendments added to the classes of claims which were originally provable under Section 63 (a), and provided for the proof of claims not theretofore provable. The amended proof of claim in the instant case, which is for "liquidated damages for breach of covenant" contained in a lease of real estate (R. 12), is obviously included in the class of claims mentioned in Clause (7), and in the event that these amendments to Section 63 (a) were intended by Congress as *changes* in the law and *additions* to the class of claims theretofore provable, it necessarily follows that *Congress in enacting these amendments interpreted this claim as not having been provable under Section* 63 (*a*), *as it read prior* to these amendments.

That Congress intended the amendments of June 7, 1934 to Section 63 (a) of the Act as *changes* in the law, and *additions* to the class of claims then provable under the Section, and did not intend the amendments as being merely declaratory of the existing law, appears from

(1) The frame of the amendments to Section 63 (a) of June 7th, 1934;

(2) The Act of June 18, 1934 amending Clause (7) enacted June 7, 1934; and

(3) The proceedings in Congress preceding the enactment of the Act of June 7, 1934.

(1) *The frame of the amendments to Section* 63 (*a*) *of June* 7, 1934:

Section 63 (a) before the amendments of 1934 contained five separate and distinct clauses, consecutively numbered from 1 to 5, each providing for the proof in bankruptcy of a separate class of claims. In order to constitute a provable claim it is not necessary that the obligation contain all of the characteristics mentioned in the five clauses, but only the characteristics specified in any one of the clauses. As this Court pointed out, in allowing proof of a claim against bankrupt endorsers of unmatured promissory notes:

> "That section (63) purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former."
>
> *Maynard* v. *Elliott*, 283 U. S. 273, 277.

This Court refused to read into Clause (4) *of Section* 63 (*a*) *the limitation of Clause* (1).

The amendment of June 7, 1934, added to Section 63 (a) another clause (7) containing a limitation—that "the claim of a landlord for injury resulting from the rejection by the Trustee of an unexpired lease of real estate, or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises, plus an amount equal to the unpaid rent accrued up to said date." The limitation of Clause (7) can no more be read into Clause (4) of Section 63 (a) than could the limitation of Clause (1). Then what does Clause (7) limit? Ob-

viously, *only those claims which are made provable by Clause* (7).

That Congress in enacting Clause (7) intended to place all claims by landlords for rent or for damages or indemnity under lease covenants upon the same basis cannot be questioned. But if the claim in the instant case is provable under Clause (4), the effect of Clause (7) is to create two different classes of landlords' claims for damages or indemnity:

1. Claims provable under Clause (4), which despite the addition of Clause (7) would still be provable in unlimited amount, as the limitation of Clause (7) cannot be read into Clause (4); and
2. Claims provable under Clause (7) which will be provable only in the limited amount.

Obviously Congress intended no such distinction.

Had Congress recognized that certain types of landlords' claims for damages or indemnity under lease covenants were provable under Clause (4), it would have incorporated in Clause (7) only the words necessary to make all such claims provable, and provided for the limitation in a new sub-division (c) of Section 63, which would be applicable to all claims enumerated in sub-division (a).

It can hardly be assumed that Congress was not mindful of the frame of the section, and "mistakenly" enacted the amendment in its present form. The enactment having been made in the present form is indicative of but one thing—*that Congress never intended that any claim by a landlord for damages or indemnity under lease covenants* be provable under section 63 (a) (4).

But *we have still further evidence* from the amendment of June 7, 1934, that Congress never regarded such claims as being provable under Section 63 (a). Clauses

(6) and (6½) which were added to Section 63 (a) at the same time as Clause (7), beyond question permitted the proof of claims which were theretofore not provable. Workmen's Compensation claims which are made provable by Clause (6) were stated to be not provable in *Lane* v. *Industrial Commissioner*, 54 F. (2d) 338, 342 (*Certiorari Denied on Jurisdictional Grounds*, 286 U. S. 543). (Tort claims for negligence are made provable by Clause (6½) where an action was instituted prior to the filing of the bankruptcy petition, although not reduced to judgment until subsequent to that time. Prior to the enactment of this clause, such claims were provable only where reduced to judgment prior to the filing of the bankruptcy petition. *Schall* v. *Camors*, 251 U. S. 239.

It was hardly the intention of Congress in adding three new clauses to this Section, to have two of them, Clauses (6) and (6½) change the existing law, and the third Clause (7) merely declare that law. This, all the more so, in view of the fact that Clause (7) specifically permits the provability of future rent claims which were held by this Court to be non-provable prior to the amendment in *Manhattan Properties, Inc.*, v. *Irving Trust Co., supra.*

The enactment of Clause (7) was caused by the necessity for relief to landlords whose corporate tenants filed bankruptcy petitions. The filing of these petitions resulted not only in the loss by the landlord of the benefits of the lease, but prevented him from sharing in the distribution of the bankrupt's assets for the damage suffered by him consequent upon the breach of the lease. To assume that Clause (7) was declaratory of the law in that damages under a covenant contained in a lease of real estate were provable prior to its enactment, would lead to a result exactly contrary to that intended by Congress in enacting the amendment—*that claims were formerly provable by a landlord*

for damages under a covenant in a lease of real estate in unlimited amount, and that since the effective date of Clause (7) such claims may only be proven in an amount equal to "the rent reserved by the lease without acceleration for the year next succeeding the date of the surrender of the premises, plus an amount equal to the unpaid rent accrued up to said date." Obviously it was not the intention of Congress to impose further hardships upon landlords and to limit claims which were formerly provable by landlords.

Congress clearly intended in enacting Clause (7) to provide for the proof of a new class of claims not theretofore provable—claims for future rents and damages and indemnity under covenants in leases, but limited as to amount. By limiting the amount for which such claims could be proven, Congress clearly indicated that those claims were not theretofore provable, as the purpose of the amendment was to enlarge and not limit the rights of landlords.

(2) *The Act of June 18, 1934, amending Clause (7) enacted June 7, 1934:*

The latter part of Clause (7), as enacted by Congress in the Act of June 7, 1934, reads, *"provided further that the provisions of this Clause (7) shall apply to estates pending at the time of the enactment of this amendatory act."* By Act of June 18, 1934 the words *"in which the time for filing such claims has not expired"* were added to that provision, so that it now reads as amended *"provided further that the provisions of this Clause (7) shall apply to estates pending at the time of the enactment of this amendatory act, in which the time for filing such claims has not expired."*

The reason for the addition of the words *"in which the time for filing such claims has not expired"* by Act of June

18, 1934, is set forth in the report of the Senate Judiciary Committee (Senate Report 1404, 73rd Congress, Second Session).

> "The committee is of the opinion that the provisions of clause (7), quoted above, should be limited in operation to those estates in which the time for filing claims has not expired. If applied to estates in which the time for filing claims has expired, these provisions would entail much inconvenience, expense, and confusion, in many cases necessitating the reopening of estates which are ready for final settlement and in which the time for filing claims expired many months ago. The sole purpose of this bill (S. 3779) is to avoid such undesirable results of the provisions of clause (7)."

It is obvious that a statute enlarging the class of claims provable in bankruptcy would result in great inconvenience and confusion, if it affected estates in which the time for filing claims had expired. If this statute were made applicable only to those pending cases in which the time for filing claims had not expired, the administration of bankrupt estates would not be in any wise affected.

But suppose the statute did not enlarge the class of claims provable, but limited in amount claims which were formerly provable. Such a statute would result in confusion if applied to *any* pending cases. Although the time for the filing of claims may not have expired, dividends may have been paid. The task of securing the return of dividends already paid to landlord creditors would in many cases prove not only difficult but impossible. In any event, the limitation of the application of such a statute to pending cases in which the time for the filing of claims had not expired, would serve no useful purpose. It would not eliminate confusion resulting from such a statute being made applicable to pending cases.

If Clause (7) amended Section 63 (a) by limiting in amount claims formerly provable thereunder, Congress in amending the Clause within two weeks of its enactment, to eliminate inconvenience, expense and confusion resulting from the operation thereof, would have limited the application of the Clause to future estates, as the limitation to pending estates in which the time for the filing of claims has not expired would not attain the desired result.

But this result would be attained by limiting the application of the Clause to pending estates in which the time for the filing of claims has not expired, *if the Clause was not a limitation to Section 63 (a), but an enlargement of the class of claims provable.* Since the amendment of June 18, 1934 enacted for the purpose of eliminating inconvenience, expense and confusion in the operation of Clause (7), would have that result only in the event that the clause enlarged the class of provable claims, it follows that the clause must have been intended by Congress as an enlargement of the class of claims provable, and not a limitation.

(3) *The proceedings in Congress preceding the Act of June 7, 1934:*

The verbiage of Clause (7) of the Amendments of June 7, 1934, was revised several times before the final passage of the clause in its present form, as an amendment to Section 63 (a). But a Clause (7) covering the same subject matter, although differently worded, was included in the bill originally introduced in the House of Representatives (H. R. 5884), amending Section 63 (a) of the Bankruptcy Act, which was entitled *"Changes in Existing Law"* (House Report 194, 73rd Congress, First Session). This report of the House of Representatives was reprinted in Senate Report 482 (73rd Congress, Second Session).

Clause (7) as it was originally worded in House Bill 5884, read:

> "(7) Claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under Section 63b of this Act."

Clause (7) as finally worded is similar in context, covering the same subject matter—claims for future rents and damages for breach of lease—and the entitlement by Congress of the proceedings pursuant to which the clause was added to the Bankruptcy Act as *"Changes in Existing Law"* conclusively proves that Congress regarded the clause as not being declaratory of the law, *but as changing the law.*

Point II.

This Court in Manhattan Properties v. Irving Trust Co., supra, affirmed the doctrine long established by the lower Federal courts that claims for rent or damages consequent upon the abrogation of leases are not provable in bankruptcy. This doctrine is based not upon the language employed in the leases but the essential nature of such claims.

This Court in *Manhattan Properties* v. *Irving Trust Co., supra,* pointed out that the decisions of the Federal courts uniformly held that claims for loss of rent, or for damages consequent on the abrogation of leases, were not provable under Section 63 (p. 335). The basis of the principle preventing the proof of such claims lies in the distinction between covenants affecting realty and personalty.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, the Chicago Auditorium Association granted to the bankrupt the baggage and livery privilege of the Auditorium Hotel for a term of five years, for a stipulated consideration, payable monthly. At the time of the filing of

the bankruptcy petition the contract was in full force and effect, and neither party was in default. This Court held the Chicago Auditorium Association to have a provable claim in bankruptcy, giving the filing of the bankruptcy petition the effect of an anticipatory breach of contract. The importance of this often cited decision lies in the distinction therein made with respect to contracts dealing with relationship of landlord and tenant, this Court having stated at page 590:

> "besides which a number of cases arising out of the relation of landlord and tenant are cited: *Re Ells,* 98 Fed. 967; *Re Pennewell,* 55 C. C. A. 571, 119 Fed. 139; *Watson* v. *Merrill,* 69 L. R. A. 719, 69 C. C. A. 185, 136 Fed. 359; *Re Roth,* 31 L. R. A. (N. S.) 270, 104 C. C. A. 649, 181 Fed. 667; *Colman Co. v. Withoft,* 115 C. C. A. 222, 195 Fed. 250. *Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the mere personalty,'* Co. Litt. 292, b, § 513." (Italics ours.)

This distinction was again adverted to by this Court in *Gardner* v. *Butler & Co.,* 245 U. S. 603, at page 605:

> "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

The rent covenant is totally different from covenants relating to personalty, the nature of this covenant being well set forth in *Re Roth & Appel,* 181 Fed. 667 (referred to by this Court in *Manhattan Properties* v. *Irving Trust Co., supra*), in the following language:

> "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time

stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in præsenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent. *Watson* v. *Merrill*, 136 Fed. 362, 69 C. C. A. 185, 69 L. R. A. 719. See, also, Coke on Littleton, 292b; *Wood* v. *Partridge*, 11 Mass. 492; *Bordman* v. *Osborn*, 23 Pic. (Mass.) 299." (669.)

The nature of the rent covenant which prohibits the proof of a claim for future rent likewise prohibits the proof of a claim for damages for breach of a lease of real estate. Whether or not any damage will be suffered by the landlord by reason of the breach of the lease is contingent upon the accrual of the rent days specified in the lease—the same contingency which bars the proof of a claim for future rent.

Or to put it differently:

The damage suffered by a landlord by reason of the breach of a lease by the tenant is the loss of future rents. This loss would be suffered by the landlord only in the event that the rent reserved in the lease to be paid in the future should actually become due. Whether this rent would ever accrue and become due is dependent upon the arrival of the rent days specified in the lease—the contingency which bars the proof of a claim for future rent. This contingency which bars the proof of a claim for future

rent likewise bars the proof of a claim for damages for breach of lease.

The use of the words "that the filing of any petition in bankruptcy * * * shall be deemed to constitute a breach of this lease, and thereupon *ipso facto* * * * this lease shall become and be terminated, and * * * the lessor shall * * * recover * * * damages for such breach in an amount equal to the amount of the rent reserved in this lease, for the residue of the term hereof, less the fair rental value of the demised premises for the residue of the said term," (R. 12) in the instant lease, in no wise affects the nature of the claim presented. In *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* and in the cases there collated at page 335, (after the statement "soon after the passage of the Act several Federal courts were called upon to decide the question (the provability of claims for loss of rent or for damages consequent on the abrogation of leases), and they uniformly held such claims were not provable debts under § 63"), the claims were all based in fact upon an estimation of the landlord's loss of future rent—the difference between the rent reserved in the lease to the end of the term, and the rental value for the same period. *The claim filed in the instant case is for exactly the same thing.* The determining factor governing the proof of claims in bankruptcy is the nature of the claim sought to be proved—and not the words employed in creating the obligation which affords the basis for the claim. As stated in *Watson* v. *Merrill,* 136 Fed. 359 (C. C. A. 8):

> "It is, however, the nature of the claim, and not the name which is applied to it, that conditions its provability in bankruptcy." (360.)

It is the fact of the distinction between the nature of covenants relating to real property and personal property, which has uniformly barred the proof of claims for rent,

and damages and indemnity based upon the abrogation of leases of real estate, and not any particular language employed in the leases. The nature of the claim in the instant case is identical with that in *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* the difference of verbiage employed in the leases in the respective cases having in no wise affected the nature of the claims. The claim in the instant case is for damages for breach of a covenant in the lease, as was the one in *Manhattan Properties, Inc.* v. *Irving Trust Co., supra,* and is therefore not provable.

Point III.

The prescribed measure of damages is impossible of calculation and sounds in penalty.

The damage clause contained in the covenant of the lease upon which the proof of claim is based provides for the following measure:

> "* * * an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 12.)

This measure of damages was specifically held too speculative for proof in bankruptcy by the court below in *Re Metropolitan Chain Stores, Inc., Malavazos* v. *Irving Trust Co.,* 66 F. (2d) 482, the court having stated at page 484:

> "But a second ground taken for holding the claim too contingent for proof in bankruptcy was the uncertainty whether there would be any loss in rents. That uncertainty exists equally here. The measure of damages for failure by a lessee to accept a lease for which he had contracted is presumably the difference between the rent stipulated in the lease and rent obtainable from other parties if the premises are relet. See *Addieg* v. *Tull,* 187 F. 101, 103 (C. C. A. 2); 3

Williston, Contracts, § 1405. In the case at bar the original term was not to begin until January 1, 1935, and was to run for thirty years thereafter. Whether during that distant period the landlord will profit or lose by reason of the prospective tenant's repudiation of his contract (assuming without decision that bankruptcy may be deemed such) is *pure speculation.* Cf. *Dunbar* v. *Dunbar,* 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084; *Hermitage Co.* v. *Levine,* 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015." (Italics ours.)

In *Perry* v. *Irving Trust Co., supra,* the case being argued together with the present one, the court recognized the argument against the proof of the claim, stating at page 91:

"The argument contra may be stated as follows: If bankruptcy be an anticipatory breach, as it is, then, in a case where the lessee has promised to pay the loss, the promise or the whole series of promises, is repudiated at once. To calculate the damages, as in the case of other anticipatory breaches, the value of the consideration restored—in this case the land—will be presently estimated by the best means accessible. The result is exactly the measure to which the parties have themselves agreed in the covenant at bar. If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is there not when there is?"

And then went on to answer this argument by saying:

"This argument loses sight of the real objection to allowing the claim when damages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be manageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast and a forecast in these circumstances will not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. It is the uncertainty in fact of the loss that invalidates the claim;

> that is not remedied by an approximation which the law will accept in other connections. But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable. The only question is whether that promise is lawful, whether it makes a contract, and as to that we have it on the highest authority that it liquidates 'the damages upon a footing familiar and fair.' *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 602, 38 S. Ct. 211, 62 L. Ed. 497."

But is this measure of damages held purely speculative in *Re Metropolitan Chain Stores, Inc., supra,* any the less speculative because the parties expressly agreed to it? Can this measure which is not applicable in bankruptcy, when impliedly agreed upon, form the basis of a provable claim because expressly agreed upon? It is most illogical to assume that the Bankruptcy Court will speculate as to the amount of the claimant's damage merely because the claimant and bankrupt agreed upon a speculation being made, especially in view of the fact that the rights of all the other creditors who did not consent to such speculation, would be affected thereby.

The tenant had nothing to lose by consenting to such a speculation, as the payment would be made out of assets of its bankrupt estate, and the loss suffered by its creditors. As stated by this Court in *Kothe* v. *Taylor Trust,* 280 U. S. 224, 226:

> "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the

> amount of the claim to be presented; most probably that would affect only those entitled to share in the proceeds of property beyond his control."

This measure of damages is all the more speculative by reason of the provisions in the lease terminating the period of the demise prior to the expiration date mentioned therein, in the event of the destruction of the premises by fire or other unavoidable casualty, or in the event of the condemnation of the premises by the city or other authorities (R. 8). *The "residue of the term" of the lease is indeterminate.* One of these contingencies set forth in the lease might occur the day following the filing of the bankruptcy petition, in which event "the residue of the term" would be one day.

This situation is very similar to that presented in *Dunbar* v. *Dunbar,* 190 U. S. 340, where a claim based on an alimony agreement to pay a stipulated sum "during her life, or until she marries", was denied proof in bankruptcy, this Court stating:

> "But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency?" (p. 345.)

The possibility of the demised premises being destroyed by fire or other unavoidable casualty or of its being taken in condemnation proceedings, can no more be calculated than the continuance of widowhood. Since the "residue of the term" could not be ascertained at the time of the filing of the bankruptcy petition, *the prescribed measure of damages is impossible of calculation.*

The stipulated measure of damages is penal in effect and therefore unenforcible.

> "Generally whenever the damages flowing from a breach of contract can be easily established or where the damages fixed are plainly disproportionate to the injury the stipulated sum will be treated as a penalty. So where a strict construction would result in absurdity. There must be some attempt to proportion these damages to the actual loss. The parties must not lose sight of the principle of compensation."
>
> *Seidlitz* v. *Auerbach,* 230 N. Y. 167, 173.

There was no attempt made in the preparation of the damage clause in the instant lease to apportion the damage to the actual loss. The court below in *Irving Trust Co.* v. *Perry, supra,* recognized this defect in the clause, stating at page 92:

> "* * * but there is one doubt that does arise; whether the clause is for a penalty because the future payments are not discounted to their present values. If the lessee must pay at once the sum of a series of installments, each consisting of the difference between the rent reserved on successive rent days, and the estimated rent which will have been received on those days, the recovery will surely be more than compensatory. The present value of such an installment, payable twenty years hence, is very much less than its face. Whether this would invalidate the whole clause under *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, 50 S. Ct. 142, 74 L. Ed. 382, we need not say, because we think that the lease should not be read in that way."

The court then went on in an attempt to remedy this defect:

> "Were a lease to be sold nobody would think of valuing it so; he would discount the future payments. The meaning is indeed doubtful, but as we are not bound to view the language with a hostile eye, we shall construe it to save the clause, and we therefore

> hold that the proper measure of damage is the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period. We need not therefore decide whether if future installments were payable at their face the clause would be void as a penalty."

But the court did not have the power to make over the contract of the parties. It could not supply the omission in the clause relative to the discounting of the future payments in order to avoid the penal nature of the provision. *Hermitage* v. *Levine,* 248 N. Y. 333 (opinion by Mr. Justice Cardozo, then Chief Judge). The measure of damage stipulated in the lease was plainly disproportionate to the injury and constituted an unenforcible penal provision. *Kothe* v. *Taylor Trust, supra.*

Point IV.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, and the proof of claim of the respondents reduced to the sum of $1,648.70, representing the rent deficiencies and electric charges, with interest thereon due at the time of the filing of the bankruptcy petition.

Respectfully submitted,

IRVING L. ERNST,
LESTER D. MELZER,
Counsel for Petitioner.

CONTENTS.

	Page
Consent to Petition for Writ of Certiorari	1
Joinder in Motion to Advance for Argument	1
Opinions below	2
Jurisdiction	2
Statement of Facts and Issue presented	2
The Statute involved	3
Reasons for Respondent's Consent and Joinder in Motion to Advance	4
The Issue is not affected or its importance diminished by Amendments to Bankruptcy Act of June 7, 1934 and June 18, 1934	11
Conclusion	14

Citations.

A. W. Perry, Inc. v. *Irving Trust Co., Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.*, 69 Fed. (2d) 90	2, 4, 14
Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581	7
Ells, In re, 98 Fed. 967	5
Gardiner v. *Butler & Co.*, 245 U. S. 603	6
Houghton, Ex parte, Fed. Cas. 6725	5
Kothe, Trustee v. *R. C. Taylor Trust*, 280 U. S. 224	6, 10
Lake, Ex parte, Fed. Cas. 7991	5
Manhattan Properties, Inc. v. *Irving Trust Company*, 54 S. Ct. 385	6
Savory v. *Stocking*, 4 Cush. (Mass.) 607	6
Slocum v. *Soliday*, 183 Fed. 410	5
Wm. Filene's Sons Company v. *Weed*, 245 U. S. 597	6

Statutes.

Bankruptcy Act of 1898 (30 Stat. 562) as amended (U. S. C. A. Title 11)	4
Sec. 1 (U. S. C. A. Title 11, Sec. 1)	4
Sec. 17 (U. S. C. A. Title 11, Sec. 35)	4
Sec. 63 (U. S. C. A. Title 11, Sec. 103)	4
Amendments to Bankruptcy Act.	
Public No. 296, 73rd Congress, approved June 7, 1934	11
Public No. 387, 73rd Congress, approved June 18, 1934	12
Judicial Code, Sec. 240 (a) as amended, (U. S. C. A. Title 28, Sec. 347 (a))	2

Supreme Court of the United States

OCTOBER TERM 1934

No. 173

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER and FRANCIS H. APPLETON, JR., Trustees of the Real Estate Associates,

Respondents.

CONSENT OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI AND JOINDER IN MOTION TO ADVANCE.

The respondents in the above entitled cause hereby consent to the petition for writ of certiorari heretofore filed by said petitioner, seeking to review the decision of the Circuit Court of Appeals for the Second Circuit and respectfully ask that said petition be granted.

The respondents also hereby join in the motion heretofore filed by the petitioner, praying that, if said petition shall be granted, said case be advanced and assigned for

argument with the case of *Irving Trust Company, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.* vs. *A. W. Perry, Inc.*, No. 22, October Term 1934, or immediately thereafter.

Opinions Below.

The order of the Referee appears at p. 27 of the Record. His certificate on petition for review (R. 35 et seq.) embodies a very brief opinion, which is not reported.

The memorandum and order in the District Court are found at pp. 38 and 39 of the record. Neither is reported and there was no opinion by the Court.

Nor was there any opinion in the Circuit Court of Appeals. The order of said Court merely affirmed the decision of the District Court and appears at p. 49 of the record.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit, which the petitioner herein seeks to have reviewed, was entered June 27, 1934 (R. pp. 49-50).

The petition for writ of certiorari herein was filed on July 12, 1934; and the jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Sec. 347 (a)).

Statement of Facts and Issue Presented.

The statement of facts is accurately set out in the petition heretofore filed. The issue is the right of the landlord to prove against the bankrupt estate of the

lessee a claim based upon the following provision in the lease, namely:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R, 14.)

The Statute Involved.

The case turns upon the interpretation of the following sections of the Bankruptcy Act, defining provable claims.

"Section 63. Debts Which May Be Proved.

(a) Debts of the bankrupt may be proved and allowed against his estate which are

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * *

(4) founded upon an open account, or upon a contract express or implied; * * *

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

"Section 1. (11) 'Debt' shall include any debt, demand, or claim provable in bankruptcy."

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * * "

(Bankruptcy Act of July 1, 1898 (30 Stat. 562), as amended, Sections 1, 17, 63; U. S. C. A. Title 11, Section 1, 35, 103.)

Reasons for Respondents' Consent and Joinder in Motion to Advance

The respondents agree that the clause in the lease in this case, upon which respondents' claim is based, is substantially identical with the clause which was involved in said case of *Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.* vs. *A. W. Perry, Inc.*, above referred to, (decision of Circuit Court of Appeals for the Second Circuit reported as *A. W. Perry Inc.* v. *Irving Trust Company, Trustee, etc.*, 69 Fed. (2d) 90) and that the decision of the Circuit Court of Appeals for the Second Circuit is the same in the two cases. The issues in the two cases are, therefore, the same.

The respondents respectfully ask that the petition be granted and the motion to advance be allowed, because they are very desirous of being heard orally upon these issues before this Honorable Court before decision shall

be rendered in said *Outfitters Operating Realty Company* case, and of presenting certain arguments bearing thereon, based largely upon previous decisions of this Court which would appear to be controlling in this case in their favor.

They desire to be heard orally in this Court, not only because the issues and principles involved, and particularly the decision which shall be rendered thereon, are of great importance to the business community in Massachusetts, where the respondents live, where their properties are situated and where they carry on their business, but also because this series of provisions in leases, having to do with termination in case of bankruptcy of the lessee and with the rights and remedies of the landlord in such cases, was an historical development which, to the best of their knowledge and belief, originated in Boston.

Many of the leading decisions, also, in the long line of cases which have adjudicated the provability or non-provability of the various kinds of claims which landlords have sought to prove, have been decisions of the Circuit Court of Appeals for the First Circuit or of the District Courts within that Circuit, for example:

In re Ells, 98 Fed. 967 (D.C. D. Mass. 1900);

Slocum vs. *Soliday,* 183 Fed. 410 (C.C.A. 1st 1910);

McDonnell vs. *Woods,* 298 Fed. 434 (C.C.A. 1st 1924);

Ex Parte Houghton, et al., Fed. Cas. No. 6725 (D.C. D. Mass. 1871);

Ex Parte Lake, et al., Fed. Cas. No. 7991 (D.C. D. Mass. 1877).

See also

Savory vs. *Stocking,* 4 Cush. (Mass.) 607 (1849).

Furthermore, three of the leading decisions by this Court, dealing with the status of the landlord's claims in bankruptcy or receivership, were brought to this Court by writ of certiorari to the Circuit Court of Appeals for the First Circuit, namely:

Wm. Filene's Sons Company vs. *Weed,* 245 U. S. 597 (1918);

Gardiner vs. *Butler & Co.* 245 U. S. 603 (1918);

Kothe, Trustee, vs. *R. C. Taylor Trust,* 280 U. S. 224 (1930).

In the case of *Manhattan Properties Inc.* vs. *Irving Trust Company,* 54 S. Ct. 385, decided by this Court February 5, 1934, the landlord sought to prove "for loss of rents payable in the future," basing the claim first upon the covenant to pay rent and, second, upon covenants that in case of bankruptcy the landlord might re-enter, and in that case the tenant would indemnify him against loss of rents for the remainder of the term. The covenant to pay rent, it may perhaps be assumed, was in the usual form. The specific indemnity agreement in one of the leases there under consideration was that, if bankruptcy proceedings should be instituted by or against the tenant, the landlord might re-enter and re-let the premises, as agent for the tenant, and that the tenant would pay, each month, the deficit, if any, accruing from the difference between the amount to be paid as rent under the lease and the amount received by the landlord upon

the re-letting. In the other lease, the agreement was that, upon bankruptcy, the lessor might re-enter and thereby terminate the lease and the lessee would "indemnify the Lessor against all loss of rent * * * during the residue of the term * * * ."

This Court, on the strength of a long line of authorities, denied the proof based on the covenant of the lessee to pay the future rent; and it denied the proof based on the indemnity covenants, not only because the obligation imposed by those covenants was to be performed at some date or dates *after* bankruptcy and was "contingent on what may happen from month to month or up to the end of the original term," but on the further ground that they constituted new contracts which came into being "not by virtue of the bankruptcy proceeding, but by force of the act of re-entry, which must occur at a date subsequent to the filing of the petition."

It would seem clear that, as these leases had not been terminated at the time of petition filed, there was no claim then in existence, on behalf of the landlord, under either lease, and that there could be no claim therefore, provable in bankruptcy, except upon the theory that the bankruptcy constituted an anticipatory breach and thereby effected a termination of the lease under the doctrine of *Central Trust Company* vs. *Chicago Auditorium Association,* 240 U. S. 581, 589. The application of that doctrine in the *Manhattan Properties* case, however, would have been inappropriate and illogical. The provisions of those particular leases indicate clearly the intent of the parties that, in the event of bankruptcy the leases should not terminate, *unless* the landlord should take the affirmative step, after petition filed, of exercising

his option to re-enter and re-possess. If he did not, the lease would continue in being and the lessee's obligation to pay rent would still exist and the successive instalments of rent would constitute valid recurring obligations of the bankrupt lessee after his discharge. Where the landlord had expressly reserved the right to decide *after* petition filed whether or not he would terminate, and had undertaken to protect himself as regards the future by indemnity covenants *in case* he elected to terminate, it would have been illogical to ignore this option provision and to apply the doctrine of anticipatory breach merely because a bankruptcy petition was filed, and thereby give the landlord the right of proof for damages against the bankrupt estate of the lessee.

If the lease was not terminated, the doctrine stated by Lord Coke (Co. Litt. sec. 513) was properly applicable, namely, that inasmuch as the rent issued out of the land, the liability therefor would not accrue, except as the right of occupancy continued and the time for payment of the successive instalments of rent arrived. The long line of decisions which have denied the right of the landlord to prove for future rent, under leases of the type just described, in many of which cases the Court has cited or relied upon Lord Coke and his statement of this doctrine, are therefore entirely sound.

The present case is essentially different. The lease here is of that kind which was distinguished by this Court near the end of its opinion in the *Manhattan Properties* case where, after stating that "there can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfillment of which

is contingent on what may happen from month to month or up to the end of the original term," this Court continued:

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future."

The lease in the instant case contained the kind of agreement thus described by this Court. By its express language the lease terminated upon the filing of the petition; the landlord had no option or election; the tenant had no further right of occupancy; and no further instalments of rent could issue out of the land; but the landlord *has lost his lease and his contract.*

This provision is very far from being an attempted "evasion of the long established rule * * * by mere recourse to express covenants," as is suggested in the petition for the writ of certiorari in said *Outfitters Operating Realty Company* case (at p. 7). It is far from being "merely an agreement between the parties, contrary to the provisions of the Bankruptcy Act, giving the landlord a provable claim" as was said, for example, in the brief of *amici curiae* in support of the petition in said *Outfitters Operating Realty Company* case which was filed by counsel for the trustees in bankruptcy of Louis K. Liggett Company (at p. 10).

This difference is not a mere matter of words, to make that provable which would not otherwise be provable; it is not a mere matter of inserting an "express covenant"; it is an essential difference in the structure of

the lease. A condition is inserted in the lease, the happening of which constitutes a breach of the lease and terminates the leasehold. There is no semblance of evasion and, so far as the landlord is concerned, there is no opportunity for evasion. The provision is agreed on when the lease is made. The lessor has thereafter no control over this contingency of the bankruptcy of the lessee. If bankruptcy comes, the lease is at an end, which may or may not be an advantage to the lessor. In the natural course, termination by the bankruptcy of the lessee would be of advantage to the lessor only if rents have risen. If they have declined, the termination is an injury to the lessor for his contract of lease has been breached and lost. It is this damage for which he seeks to prove, and there can be no question of the equity of his claim. The only possibility of evasion in connection with such a clause is the possibility of evasion by the lessee who may, if he chooses, file a voluntary petition and thereby effect a termination. If it were to be held that the landlord's claim in such case, for the reasonable measure of damage which is here prescribed, could not be proved, there would be strong inducement to lessees, where rents have declined, to terminate their leases by the device of a fictitious bankruptcy and a tempting avenue to fraud would be opened.

If a measure of damages is attempted to be set up in such a lease, which is unreasonable or which involves a penalty, the remedy is not far to seek. Such unreasonable claim or penalty will be disallowed by the Court, notwithstanding the termination of the lease by the event of bankruptcy, as was done in *Kothe* vs. *R. C. Taylor Trust,* 280 U. S. 224. No landlord can by any form of

words entitle himself upon termination to a penalty or to more than a fair and reasonable measure of his damage.

The *Manhattan Properties* case, notwithstanding what may perhaps be regarded as an intimation in the portion quoted above from the latter part of its opinion, has not squarely decided the precise issue of the provability of the landlord's claim for damage under this *ipso facto* clause. It would appear that all the essential elements of the question, as applied to this type of lease, have been adjudicated in accordance with the contentions of these respondents in other decisions of this Court, to say nothing of various decisions along the same lines in the various Circuits. But the matter will not be clear and definite until this Court has spoken.

The issue is not affected or its importance diminished by the Amendments to the Bankruptcy Act approved June 7, 1934 and June 18, 1934.

It is submitted that the importance of the subject matter is not at all diminished by the recent amendment to the Bankruptcy Act, approved June 7, 1934, (Public—No. 296—73d Congress), which amended Section 63a so as to provide that certain additional kinds of claims shall be provable, among them the following (clause 7):

> "(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the

surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act."

Those provisions do not affect the present case, because by a later amendment (Public—No. 387—73d Congress), approved June 18, 1934, the following was added at the end of said clause:

"in which the time for filing such claims has not expired."

Moreover, it may well be doubted in any case whether the provisions of the Act of June 7, 1934, would be applicable to the kind of claim sought to be proved in this case. The new clause 7, thus added to Section 63a of the Bankruptcy Act, would appear to have been designed primarily, if not wholly, so far as landlords are concerned, to give them the right of proof for "future rents" or for damages under indemnity covenants relating to future rents. After providing that such claims shall be provable, it then provides that the amount allowable upon such claims shall not exceed the rent reserved in the lease for the succeeding year, and further provides that in case of "assignment of future rent claims" the court shall scrutinize the circumstances and the amount paid "in determining the amount of damages allowed assignee hereunder."

In enacting this provision the Congress obviously had in mind the decision of this Court in the *Manhattan*

Properties case, hereinbefore discussed, and the kind of claims which this Court in that case had held not provable. This is indicated both by the description in the new clause 7 of the claims which are made provable and by the limitation of the amount of proof permitted and the qualification which is inserted regarding assignment of claims. It is further confirmed by the fact that the new clause 7 is enacted definitely as an amendment of Section 63a of the Bankruptcy Act and is made applicable "whether the bankrupt be an individual or a corporation"; thus indicating that Congress had clearly in mind the fact that this Court, in the *Manhattan Properties* case, had found the provision for proof of claims for future rent, as contained in the Act of 1933, (approved March 3, 1933, 47 Stat. 1467—11 U. S. C. A. Sec. 202 (a)) inapplicable because that Act applied only to individuals and because it did not expressly amend said Section 63a.

It is, of course, the contention of these respondents that their claim in this case is provable under Section 63a (1) and (4). If the new Act of 1934 were applicable to the bankrupt estate in the hands of the petitioner, it would also be their claim that the limitations upon proof, which are imposed by the new clause 7, are applicable only to the kind of claims which are made provable by that clause, and not to claims provable under other clauses of said Section 63a; that the claim which they seek here to prove is not a claim for "future rent" and is not a claim for damages or indemnity against loss of rent. It is broader than that; it is a claim based upon a breach of the entire lease contract, because that contract was terminated by the filing of the petition in bankruptcy, and because damages for this entire breach

thereupon accrued. Whatever else this lease may be, it is a contract between the parties. Where such lease contract is breached and terminated by bankruptcy, there is no rational reason for denying to the landlord, merely because he is a landlord, the right to prove his claim for damages in an amount which fairly represents the damage sustained by him from the loss of the contract.

CONCLUSION.

For the reasons hereinbefore set out, these respondents consent to the petition for writ of certiorari and respectfully ask that said writ be issued.

For the same reasons these respondents also hereby join in the petitioner's motion that, if said writ shall issue, said case be advanced and assigned for argument with said case of *Irving Trust Company, Trustee,* vs. *A. W. Perry Inc.,* No. 22, October Term 1934, or immediately thereafter.

Respectfully submitted,

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER and FRANCIS H. APPLETON, JR.,
Trustees of the Real Estate Associates.

By their Attorneys,
BURTON E. EAMES,
GEORGE B. ROWLINGS.

TYLER, EAMES, WRIGHT & REYNOLDS
of Counsel

August 3, 1934.

INDEX.

	Page
Opinions Below	1
Statement of Facts	2
Issue Presented	4
Statutes Involved	4
Summary of Argument	5
Argument	10
I. This case is not adversely controlled by either the decision or the reasoning in *Manhattan Properties Inc.* vs. *Irving Trust Company*, 291 U. S. 320	11
II. This claim is provable under existing decisions of this Court which have already adjudicated the three essential points upon which this question depends	17
(1) The provision in the lease that, in case of termination for any cause specified therein, the Lessee should thereupon be liable to the Lessor in damages, is effective to create such liability immediately upon termination, provided only the measure of damage is reasonable and fair	18
(2) The measure of damages set out in this lease, i.e, the difference between the rent reserved in the lease and the rental value for the residue of the term, is both reasonable and fair	24
(3) Since the termination of lease, upon which event the Lessee became immediately liable to the Lessor for damages measured as above, was coincident with the filing of the petition, the liability is provable under Section 63 (a) (4)	31
(4) There is no "historical distinction" which under these circumstances can justify the exclusion of this claim from proof	34
III. There is no indication that Congress has manifested any intention to exclude claims of this type from claims provable under Section 63 (a) (4)	36
IV. Not only is the allowance of this proof in no manner inconsistent with the Bankruptcy Act, but its disallowance would be in direct violation of the policy of that Act	44
V. The judgment of the Circuit Court of Appeals for the Second Circuit, affirming the order below whereby the claim was allowed, should be affirmed	49

Table of Cases.

	Page
Addieg vs. *Tull*, 187 Fed. 101	26
A. W. Perry, Inc. vs. *Irving Trust Company, Trustee in Bankruptcy of Outfitters' Operating Realty Co., Inc.*, 69 Fed. (2d) 90 (See In Re Outfitters' Operating Realty Co. Inc.	4
Central Trust Company vs. *Chicago Auditorium Association*, 240 U. S. 581	7, 12, 18, 32, 39, 47
Cobb vs. *Overman*, 109 Fed. 65	33
Coke on Littleton, Section 513	12, 20
Ex Parte Blake, 11 Ch. Div. 572	26
Ex Parte Llynvi Coal & Iron Company (In Re Hide) L. R. 7, Ch. Ap. 28	26
Ex Parte Pollard, Fed. Cas. No. 11252	33
Gardiner vs. *Butler & Company*, 245 U. S. 603	7, 17, 22, 25, 27
Hermitage Company vs. *Levine*, 248 N. Y. 333	22
In Re Desnoyers Shoe Company, 227 Fed. 401	33
In Re Mullings Clothing Company, 238 Fed. 58, 243 U. S. 635	26, 28
In Re National Credit Clothing Company, 66 Fed. (2d) 371	28
In Re Neff, 157 Fed. 57 (C.C.A. 6th 1907)	33
In Re Outfitters' Operating Realty Co. Inc., 69 Fed. (2d) 90 (See A. W. Perry Inc. vs. Irving Trust Company)	29, 30, 43
In Re Panther Lead Company, (1896), 1 Ch. Div. 978	26
In Re Pettingill, 137 Fed. 143 (D.C. D. Mass. 1905)	33
In Re Portage Rubber Company, 296 Fed. 289	33
In Re Schultz & Guthrie, 235 Fed. 907 (D.C. D. Mass. 1916)	33
In Re Stern, 116 Fed. 604 (C.C.A. 2nd 1902)	33
In Re Swift, 112 Fed. 315, 321 (C.C.A. 1st 1901)	33
Kothe, Trustee, vs. *R. C. Taylor Trust*, 280 U. S. 224	15, 47, 48
Leo vs. *Pearce Stores*, 57 Fed. (2d) 340	26
Manhattan Properties, Inc. vs. *Irving Trust Company*, 291 U. S. 320	10, 48
Maynard vs. *Elliott*, 283 U. S. 273	13, 34, 48
R. C. Taylor Trust vs. *Kothe*, 30 Fed. (2d) 77	15, 33
Restatement Law of Contracts	26
Slocum vs. *Soliday*, 183 Fed. 410	14
Williams vs. *United States Fidelity Company*, 236 U. S. 549	47
Williston on Contracts	26
Wm. Filene's Sons Co. vs. *Weed*, 245 U. S. 597	7, 14, 17, 18, 22, 24, 27, 30, 43

STATUTES.

PAGE

Bankruptcy Act of 1898 (30 Stat. 544, 550, 562) as amended (U. S. C. A. Title 11) 5

Sec. 1 (U. S. C. A. Title 11, Sec. 1) 5

Sec. 17 (U. S. C. A. Title 11, Sec. 35) 5

Sec. 63 (U. S. C. A. Title 11, Sec. 103) 4

Sec. 63 (a) (4) 7, 8, 10, 31, 36, 37, 39, 40

Sec. 63 (a) (7) 8, 36, 37, 38, 39, 40, 42

Sec. 63 (b) 29

Amendments to Bankruptcy Act

Public No. 296, 73rd Congress, approved June 7, 1934..... 5, 36

Public No. 387, 73rd Congress, approved June 18, 1934..... 5, 37

Supreme Court of the United States

OCTOBER TERM 1934

No. 173

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Petitioner,

vs.

INGERSOLL BOWDITCH, STEPHEN W. SLEEPER and FRANCIS H. APPLETON, JR., Trustees of the Real Estate Associates,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The order of the Referee (without opinion) appears at page 18 of the Record. His certificate on petition for review (R. 21-23) embodied a very brief opinion, which is not reported.

The memorandum and order in the District Court are found at pages 23-24 of the Record. Neither is reported and there was no opinion by the Court, beyond the state-

ment that the case was ruled by the *Outfitters' Operating Realty Co.* case.

Nor was there any opinion in the Circuit Court of Appeals. The order of said Court appears at page 28 of the Record and merely affirmed the decision of the District Court.

Statement of Facts.

The lease in question was executed by the respondents, as Lessors, to the bankrupt, Sarnoff-Irving Hat Stores, Inc., as Lessee, under date of November 7, 1925. It covered premises at No. 102 Hanover Street, Boston, Massachusetts, and was for the term of ten (10) years, beginning January 1, 1926 and ending December 31, 1935. The rent was Six Thousand Five Hundred Dollars ($6,500.) a year for the first five (5) years and Seven Thousand Dollars ($7,000.) a year for the remainder of the term (R. 4 et seq.).

This lease contained the following provision:

> "and for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee, or either or any of them, shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover of the Lessee and each of them damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 9-10.)

On August 27, 1932 the Lessee, Sarnoff-Irving Hat Stores, Inc., was adjudicated bankrupt on its voluntary petition filed on that date in the United States District Court for the Southern District of New York.

Proof of claim was filed by the respondents in which (as amended) they sought to prove the following items:

(a) Rents which had become due prior to August 27, 1932 (date of petition filed) plus interest to that date.....	$1,471.62
(b) Charges for electricity furnished prior to date of petition, with interest to that date	177.08
(c) Amount of damages under said quoted clause of the lease, to wit, an amount equal to the difference between the amount of the rent reserved in the lease for the residue of the term ($7,000 per year), and the fair rental value of said premises for the residue of the term (which was taken at $4,000 per year), discounted at 6% for the period from date of bankruptcy, August 27, 1932, to the respective due dates (see computation R. 13-14)	9,018.98
Total claim	$10,667.68

This claim was allowed in full by the Referee on May 15, 1934 (R. 18). The Referee's order was affirmed by the United States District Court on June 14, 1934 (R. 23-24) and was again affirmed by the United States Circuit Court of Appeals for the Second Circuit on June 27, 1934 (R. 28).

The record indicates that the action of the Referee in allowing the damage claim (Item (c) above) and the ac-

tion of the District Judge in affirming the Referee's order were based on the decision of said Circuit Court of Appeals in *A. W. Perry, Inc.* vs. *Irving Trust Company, Trustee in Bankruptcy of Outfitters' Operating Realty Co., Inc.*, decided February 13, 1934, 69 Fed. (2d) 90 (R. 22, 23) in which it was held, under a clause substantially identical with that quoted from the lease in the instant case, that the landlord's claim was provable, provided "the series of installments, each made up of the rent reserved, less the fair rental value for that period," be discounted in order to arrive at their present value; and that such measure of damage is not open to the objection that it is a penalty. The computation of the proof in this case took into consideration the discount required by the Court in that case. Said *Outfitters' Operating Realty Co.* case is now pending in this Court upon writ of certiorari granted May 14, 1934 (No. 22, October Term 1934), and is assigned for argument immediately before the instant case.

Issue Presented.

The issue presented, therefore, is whether the Lessor may prove against the bankrupt estate of the Lessee a claim for damages under the provision in the lease which is quoted above, by reason of the breach and termination of the lease by the filing of the petition in bankruptcy.

Statutes Involved.

The case turns upon the interpretation of the following sections of the Bankruptcy Act, defining provable claims.

"Section 63, Debts Which May Be Proved.

(a) Debts of the bankrupt may be proved and allowed against his estate which are

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; • • •

(4) founded upon an open account, or upon a contract express or implied; • • •

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

"Section 1. (11) 'Debt' shall include any debt, demand, or claim provable in bankruptcy."

"Section 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts • • •"

(Bankruptcy Act of July 1, 1898 (30 Stat. 544, 550, 562), as amended, Sections 1, 17, 63; U. S. C. A. Title 11, Section 1, 35, 103.)

The Amendments to the Bankruptcy Act, which were passed on June 7, 1934 and June 18, 1934, have no application to this case, as the time for filing claims had expired long before.

Summary of Argument.

I. This Case Is Not Adversely Controlled by Either the Decision or the Reasoning in Manhattan Properties Inc. vs. Irving Trust Company, 291 U. S. 320.

The distinction between that case and this on the facts is obvious. In that case the claims were based on the covenants for future rent and on indemnity covenants

with respect to such rent, all which were to be performed in the future; and the indemnity covenants in fact were new contracts which arose "by force of the act of reentry" *after* bankruptcy. In the case at bar the filing of the petition *ipso facto* caused the breach and termination of the lease and the damage claim, based on a fair measure of damages, arose *coincident* with such termination. This Court, in the *Manhattan Properties* case, expressly reserved decision as to this type of lease.

H. This Claim Is Provable under Existing Decisions of This Court Which Have Already Adjudicated the Three Essential Points upon Which This Question Depends.

(1) *The provision in the Lease that, in case of termination for any cause specified therein, the Lessee should thereupon be liable to the Lessor in damages, is effective to create such liability immediately upon termination, provided only the measure of damages is reasonable and fair.*

Apart from any question of the right of the Lessor to prove in bankruptcy, it is established that, where a lease provides for termination in case of default by the Lessee or upon the happening of a condition (which may include the bankruptcy of the Lessee), and that upon such termination the Lessee shall be liable to the Lessor in damages, determined under a prescribed rule which is reasonable and fair, the Lessee's obligation, accordingly, arises immediately upon termination. Whether the termination is automatic by virtue of the terms of the lease or is brought about by the Lessor by entry is immaterial. The doctrine of Lord Coke that the tenant's liability for rent ceases with the termination of his lease, because rent issues out of the land and depends on continued tenancy, has no application to the tenant's liability under a per-

sonal covenant whereby he has assumed further obligations *in case* his tenancy terminates.

Wm. Filene's Sons Company vs. *Weed*, 245 U. S. 597;

Gardiner vs. *Butler & Company*, 245 U. S. 603.

(2) *The measure of damages set out in this Lease, i.e., the difference between the rent reserved in the Lease and the rental value for the residue of the term, is both reasonable and fair.*

This Court has held that the measure of damages here prescribed, to wit, the difference between the rent reserved in the lease and the rental value of the premises for the residue of the term, is reasonable and fair, and does not involve an unenforceable penalty.

Wm. Filene's Sons Company vs. *Weed*, 245 U. S. 597, 602.

The measure of damage in this case is precisely the same as in the *Filene* and *Butler* cases.

(3) *Since the Termination of Lease, upon which event the Lessee became immediately liable to the Lessor for damages measured as above, was coincident with the filing of the Petition, the liability is provable under Section* 63 (*a*) (4).

This Court has also held that, for purposes of proof in bankruptcy, a liability of the bankrupt which arose *coincident* with the filing of the petition, is a liability "owing at the time of the filing of the petition."

Central Trust Company vs. *Chicago Auditorium Association*, 240 U. S. 581.

This claim, being founded on an express contract and existing at the time of petition filed, is therefore provable under Section 63 (a) (4).

(4) *There is no "Historical Distinction" which, under these circumstances, can justify the exclusion of this claim from proof.*

The "historical distinctions" have to do with the difference between the liability for future rent, which depends on occupancy, and liability for other contract obligations payable without condition; and the difference between future rent and other contingent claims for purposes of proof; with the doctrine of anticipatory breach as being applicable to executory contracts but not to leases; and, generally, with the freedom of the tenant from future liability after his lease is terminated "except in so far as he has bound himself by contract to liability thereafter."

III. There Is No Indication that Congress Has Manifested Any Intention To Exclude Claims of This Type from Claims Provable under Section 63 (a) (4).

Since this claim is specifically within the description of claims provable under Section 63 (a) (4), there is no room for argument based upon some assumed contrary intention of Congress.

Even if clause (7) were broad enough to include this clauses of Section 63 (a) are not mutually exclusive.

In any case, however, the amendments to the Bankruptcy Law, which were passed on June 7 and June 18, 1934, were intended merely to make provable in part, but subject to the limitation in the new Clause (7), the kind of claims which were held not provable in the *Manhattan Properties* case. This is apparent both from the sequence of events (as the new clause was enacted about four months after the *Manhattan Properties* decision), and from the language used in the new Clause (7). That

language makes provable "claims for damages respecting executory contracts including future rents." It does not make provable claims for damages for *breach of lease,* but applies only to those "executory" agreements in "unexpired" leases to be performed in the future. The claim in this case is not based on an "executory agreement" but it sounds in damages for breach at date of petition filed. To hold that this new Clause (7) includes claims like the present would be to increase the hardship on the bankrupt after discharge, because he would presumably be liable for the balance of the claim.

IV. Not Only Is the Allowance of this Proof in No Manner Inconsistent with the Bankruptcy Act, but Its Disallowance Would Be in Direct Violation of the Policy of that Act.

The distinction between this case and the *Manhattan Properties* case is not a mere matter of words. It is a fundamental difference having to do with the structure of the lease.

To hold this claim provable would involve no possibility of "evasion" by the Lessor either of the Bankruptcy Law or of his own obligations. He has no control over the bankruptcy of the Lessee (unless the Lessee defaults), and he is injured by termination only in case rental values have declined.

To disallow proof in such case, however, would offer ample opportunity for evasion by lessees, particularly corporate lessees in case of chain stores or similar organizations, where the lessee corporations may be put through bankruptcy and abandoned.

If rental values have declined when the Lessee becomes bankrupt, the Lessor suffers actual damage. His damage is similar to that of a party to an executory contract whose contract is similarly terminated by the bankruptcy.

Both are creditors and the policy of the Bankruptcy Act requires that they share in the assets with other creditors.

To disallow this claim would also mean that the liability would rest upon the bankrupt after his discharge, which would be a great hardship in the case of the individual bankrupt.

V. The Judgment of the Circuit Court of Appeals for the Second Circuit Affirming the Order Below Whereby the Claim Was Allowed Should Be Affirmed.

Argument.

By the express terms of the lease the filing of the petition in bankruptcy by the Lessee (the petition was voluntary) constituted a breach of the lease and "*ipso facto* and without entry or other action by the Lessor" terminated the lease; and by express provision the Lessee "forthwith upon such termination" became obligated to the Lessor for damages "in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term" (R. 10).

It will perhaps not be disputed that this claim is "founded upon a contract express or implied" within Section 63 (a) (4), but it will be contended that the claim is not provable; and stress will be laid upon the case of *Manhattan Properties, Inc.* vs. *Irving Trust Company*, 291 U. S. 320, which it will be claimed is controlling. Respondents, on the other hand, submit (1) that the present case is clearly distinguishable from the *Manhattan Properties* case upon its facts and (2) that previous decisions of this Court have already adjudicated all the essential elements of the problem presented in this case, so that the provability of this claim, on the basis of those decisions, is not reasonably open to doubt, unless those decisions are to be reversed.

I.

This Case is not Adversely Controlled by Either the Decision or the Reasoning in Manhattan Properties, Inc. vs. Irving Trust Company, 291 U. S. 320.

The distinction between these cases on their facts is obvious.

In the *Manhattan Properties* case, the landlord sought to prove "for loss of rents payable in the future," basing the claim *first* upon the covenant in the lease to pay rent and, *second,* upon covenants that in case of bankruptcy the landlord might re-enter, and in that event the tenant would indemnify him against loss of rents for the remainder of the term. Two leases were there under consideration. The covenants to pay rent, it may perhaps be assumed, were in the usual form. The specific indemnity agreement in one of the leases was that, if bankruptcy proceedings should be instituted by or against the tenant, the landlord might re-enter and re-let the premises as agent for the tenant and that the tenant *would pay, each month, the deficit, if any, accruing from the difference between the amount to be paid as rent under the lease and the amount received by the landlord upon the re-letting.* The agreement in the other lease was that, upon bankruptcy, the Lessor might re-enter and thereby terminate the lease and the Lessee *would "indemnify the Lessor against all loss of rent* • • • *during the residue of the term* • • •."

This Court, citing in support of its decision a long line of authorities, denied the proof based on the covenant of the Lessee to pay the future rent; and it denied the proof based on the indemnity covenants, not only because the obligation imposed by those covenants was to

be performed at some date or dates *after* bankruptcy and was "contingent on what may happen from month to month or up to the end of the original term," but on the further ground that they constituted new contracts which came into being "not by virtue of the bankruptcy proceeding, but by force of the act of re-entry, which must occur at a date subsequent to the filing of the petition."

Some of the considerations which so amply justify the decision in the *Manhattan Properties* case at the same time make it clear that the essential differences of fact between that case and this are fundamental and require therefore, in the case at bar, a contrary result. May we discuss them briefly?

It would seem clear that, as the leases in the *Manhattan Properties* case had not been terminated at the time of petition filed, there could have been no claim then in existence on behalf of the landlord, under either lease, either under the covenant to pay rent or under the indemnity covenants, and therefore no claim provable in bankruptcy, *except* upon the theory that the bankruptcy constituted an anticipatory breach and thereby effected a termination of the lease upon petition filed, under the doctrine of *Central Trust Company* vs. *Chicago Auditorium Association*, 240 U. S. 581, 589; and this theory this Court refused to adopt.

So far as the claim for future installments of rent under the rent covenant was concerned, a doctrine going back to the times of Lord Coke (Co. on Litt. Sec. 513), and followed in a substantially unbroken line of decisions since that time, forbade the anticipation of such payments, namely, the doctrine that, inasmuch as the rent issued out of the land, the liability therefor could not accrue except as the right of occupancy continued and the time for payment of the successive installments of

rent arrived. The future rent was not only not due but it was also contingent and therefore not provable. The removal of the general objection to "contingent claims" (*Maynard* v. *Elliott,* 283 U. S. 273) did not remove the objection based on Lord Coke's rule. The soundness of the long line of decisions which have denied the right of the landlord to prove for future rent, or for damages for loss of future rent, under leases of the type just described, in many of which cases the Court has cited or relied upon Lord Coke and his statement of this doctrine, is not open to question.

But, apart from this, a brief consideration of the facts will suffice to show that, for the Court to have applied the theory of anticipatory breach to the leases before it in the *Manhattan Properties* case, would have been inappropriate and illogical. The provisions of those particular leases indicate clearly the intent of the parties that, in the event of bankruptcy, the leases should not terminate, *unless* the landlord should take the affirmative step, after petition filed, of exercising his option to re-enter and re-possess. If he did not, the lease would continue in being, the Lessee's obligation to pay rent would still exist and the successive installments of rent would constitute valid recurring obligations of the bankrupt Lessee after his discharge. Where the landlord had expressly reserved the right to decide *after* petition filed whether or not he would terminate, and had undertaken to protect himself as regards the future by indemnity covenants *in case* he elected to terminate, it would have been illogical to ignore this option provision and, at the behest of the landlord, to apply the doctrine of anticipatory breach merely because a bankruptcy petition was filed, and thereby to adjudge a termination at a date earlier than the parties had agreed on, in order to give the landlord

the right of proof for damages against the bankrupt estate, under either the rent or the indemnity covenants.

The kind of clause which was involved, for example, in *Slocum* vs. *Soliday,* 183 Fed. 410, (C.C.A. 1st, 1910), which provided that if the Lessee should file petition the Lessor might enter and terminate the lease, and that the Lessor should thereupon be entitled to damages in a sum equal to the difference between the rental value of the premises and the rent reserved in the lease, and the similar clause in *Wm. Filene's Sons Co.* vs. *Weed,* 245 U. S. 597, would both fall within this condemnation; because in each case the obligation to pay damages could arise only upon re-entry by the landlord after the bankruptcy.

Coming then to the case at bar, we find an entirely different state of facts. Here the filing of the petition constituted *ipso facto* a breach and termination of the lease, wholly independent of any action by the Lessor, who was powerless to prevent that result. The claim here sought to be proved is not a claim for future rent, and it is not based either upon the covenant to pay rent or upon any indemnity covenant to be performed *in futuro.* It is a claim sounding in breach of contract. It came into existence coincident with the filing of the petition and under provisions in the original lease which became operative upon and by reason of the filing of the petition, not by force of some later event; and the measure of damages which is expressly prescribed is fair.

These differences in the facts are so apparent that it would have seemed quite unnecessary to argue them but for the stress which appears to be laid, in the briefs supporting the petitioner's contentions, upon the argument that the *Manhattan Properties* case is controlling. Moreover, a careful examination of the many authorities cited

in that case discloses that none of the cases cited dealt with facts at all similar to those in the case at bar; and it further appears that the proposed amendments to the bankruptcy law, which the Court referred to as prepared by Judge Lowell but not enacted, also related to obligations arising *after* bankruptcy and by reason of the trustee's rejection of the lease, and therefore patently have no bearing upon this case.

This so-called *ipso facto* clause is comparatively new. Such a clause, but coupled with a damage provision to the effect that *all future rent* should thereupon immediately become due, came before this Court from the Circuit Court of Appeals for the First Circuit in *Kothe, Trustee,* vs. *R. C. Taylor Trust,* 280 U. S. 224 (1930). The Court below, 30 Fed. (2d) 77, 1929, had held, *first,* that as the claim arose by reason of the beginning of the bankruptcy proceedings it was in existence "at the time of the filing of the petition"; *second,* that the amount agreed upon as liquidated damages could not be said to be so far excessive as to be invalid, and that the claim was therefore provable. This decision was reversed by this Court upon the *second* of these two points only; and the obligation to pay the entire future rent was held an unenforceable penalty. There is no suggestion of criticism of the decision below so far as the *first* of the two points is concerned; indeed the intimation seems clear that if the measure of damage had been reasonable the proof would have been allowed. The Court said (pp. 226-227):

> "The amount thus stipulated is *so disproportionate to any damage reasonably to be anticipated* in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

* * * * *

> "Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. If the term were much shorter, *or* there were facts tending to disclose *a proper purpose,* the argument in favor of the lessor would be more persuasive." (Italics ours.)

This Court, in the *Manhattan Properties* case, had fully in mind the distinctions we are discussing, for near the end of its opinion in that case, after stating that "there can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term," this Court continued:

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future."

The lease in the instant case contained exactly the kind of agreement thus described by this Court. By its express language it was agreed that the filing of the petition should be a breach and termination of the lease; the landlord had no option or election; the tenant had no further right of occupancy; and no further instalments of rent could issue out of the land; but the landlord *has lost his lease and his contract.*

We know of no case where the *ipso facto* clause, coupled with a provision for a reasonable and fair measure of damage, has come before the Courts for direct adjudication on the question of provability, until the *Outfitters' Operating Realty Co.* case and the case at bar.

We come, therefore, to the merits of the question, namely, a discussion of three propositions of law, which have heretofore been definitely laid down in the decisions of this Court and which in their logical sequence lead inevitably to the conclusion that this claim is provable.

II.

This Claim is Provable Under Existing Decisions of this Court which Have Already Adjudicated the Three Essential Points upon which this Question Depends.

There are three points which, if established, leave no logical escape from the conclusion that this claim is provable. Each of these points has already been adjudicated by this Court, for it has been held

(1) that where a lease provides for termination for default, or upon a condition, (which may include in bankruptcy or insolvency of the Lessee), and that upon such termination the Lessee shall be liable to the Lessor in damages, measured by a prescribed rule which is reasonable and fair, the Lessee becomes immediately liable accordingly upon termination.

Wm. Filene's Sons Co. vs. *Weed,* 245 U. S. 597 (1918);

Gardiner vs. *Butler & Company,* 245 U. S. 603 (1918) (The first of the two cases there involved);

(2) that the measure of damages prescribed in this lease, viz., the difference between the rent reserved in the lease and the rental value of the premises for the residue of the term, is reasonable and fair and does not involve an unenforceable penalty.

Wm. Filene's Sons Co. vs. *Weed,* 245 U. S. 597, 602;

(3) that, for purposes of proof in bankruptcy, a liability of the bankrupt which arose *coincident* with the filing of the petition is a liability "owing at the time of the filing of the petition."

Central Trust Company vs. *Chicago Auditorium Association,* 240 U. S. 581 (1916).

1. The Provision in the Lease that in Case of Termination for Any Cause Specified Therein, the Lessee Should Thereupon Be Liable to the Lessor in Damages Is Effective to Create Such Liability Immediately upon Termination, Provided Only the Measure of Damage is Reasonable and Fair.

We wish to discuss this proposition, in the first place, wholly apart from the question whether the Lessor's claim for damages is provable in the bankruptcy. The point we wish to make is merely that, where the lease provides for termination by reason of default of the Lessee, or the happening of a condition, and further provides that in such case the landlord shall be entitled to a reasonable measure of damages for the breach, such provision is legally effective, and upon termination in the manner provided the damage claim at once arises. We are not concerned for the moment with the question whether the termination is effected by some voluntary act of the Lessor following the default or the happen-

ing of the condition, or whether the lease came to an end automatically under some provision contained therein. Nor are we concerned for the moment with whether the termination preceded or followed the filing of a petition in bankruptcy. Indeed we are not concerned with bankruptcy at all. We submit merely the simple proposition that, where the lease contains such provisions for termination and for a reasonable and fair measure of damages to the Lessor in that event, that when such termination does come, then coincident therewith the obligation in damages arises.

The question whether the Lessor has a provable claim in such case involves not only this question, whether a valid claim for damages arose upon the termination of the lease, but also a further vital question, namely, *when* this liability arose with reference to the date of filing of the petition. If it arose after the filing of the petition, it is obviously not provable, although its existence may be unquestioned. Although in some of the cases the Court has discussed the validity or effect of damage clauses, yet it will be found, in practically all those cases where such claims have been disallowed, that they arose, if at all, *after* petition filed, and this we submit was the sound basis for those decisions, wherever the terms of the leases were similar to the terms of the lease in this case.

We come then to the precise question with which we are now concerned, namely, whether the provision in a lease, to the effect that it may be terminated by the Lessor in the event of default or upon the happening of a condition, or the provision that the *filing of a petition* in bankruptcy by or against the Lessee *shall constitute a breach and termination,* and that in either case the Lessee shall forthwith be liable in damages to the Lessor for the breach, is effective to create

this liability *immediately upon termination* (assuming always that the measure of damage prescribed is reasonable). It seems probable that no question would have arisen but that such clause was thus effective, were it not for the statement by Lord Coke, above mentioned. This statement, where the learned author referred to the "diversity betweene duties which touch the realty, and the meere personalty", (Co. Litt. 292, b, Sec. 513) is referred to by Mr. Justice Pitney in the *Chicago Auditorium* case, and in many of the other decisions dealing with the right to prove such claims. It has troubled the courts in many cases, and it would appear from the opinions that it has given rise to some confusion.

For convenience we quote the entire section referred to from Coke on Littleton (Sec. 513):

> "*Release touts actions:* This release shall not bar the Lessor of his Rent, because it was neither debitum nor solvendum at the time of the Release made; for if the land be evicted from the Lessee before the Rent become due, the Rent is avoided, for it is to be paid out of the profits of the land; and it is a thing not meerly in action, because it may be granted over. But the Lessor before the day may acquit or release the Rent. But if a man be bound in a Bond or by contract to another to pay an hundred pounds at five several days he shall not have an action of Debt before the last day be past; and so note a diversity betweene Duties which touch the realty, and the meere personalty. But if a man be bound in a Recognizance to pay an hundred pounds at five several days, presently after the first day of payment, he shall have execution upon the Recognizance for that sum, and shall not tarry till the last be past, for that it is in the nature of several judgments. And so note a diversity between a debt due by Recog-

> nizance and a debt due by Bond or Contract. And so it is of a Covenant or Promise, after the first default, an action of Covenant, or an action upon the case doth lie, for they are several in their nature. Lastly, note a diversity between Debts and Covenants, or Promises."

It will be seen that Lord Coke, in the above quoted passage, was referring, so far as the "realty" was concerned, only to the tenant's obligation to pay *rent*. The point which the learned author had in mind evidently was that the termination of the lease and eviction of the Lessee terminated the latter's obligation to pay the rent "for it is to be paid out of the profits of the land." This is far from saying that a personal covenant entered into by the Lessee as part of the lease whereby he agrees, in the event of breach on his part and consequent termination, to pay *damages,* is not valid and effective to create the obligation it purports to create. Whether or not it is fair to assume that leases in Lord Coke's day ordinarily did not contain personal covenants, that they were demises merely, with rent reserved, so that the obligation to pay rent rested squarely upon the tenancy, it seems clear that Lord Coke, in the discussion above quoted, was referring to rent *qua* rent, and to nothing else.

But, whatever else the modern lease may or may not be, it is a contract looking to the future upon which usually both parties are bound. Not only does it ordinarily impose the obligation on the Lessor to give the Lessee the occupancy of the premises and the quiet enjoyment thereof for the stated term, but it also imposes upon the Lessee the obligation to continue his tenancy of the premises and to pay the rent and the other obligations assumed by him therein during said entire term. There is nothing in this statement of Lord Coke, or elsewhere

in law or in logic, inconsistent with the right of the Lessor, where the Lessee has assumed these obligations and then fails to perform them, to claim damages for the breach of this contract as in any other contract.

Thus in *Gardiner* vs. *Butler & Company,* 245 U. S. 603, 605, this Court, consistently with the doctrine of Lord Coke, held that the Lessor could not claim damages merely because he "has lost the benefit of his bargain from the time of his reentry", where the lease did not contain "any clause stipulating for such an allowance." As was stated in that case (p. 605):

> "In the absence of statute or express contract a Lessor who has terminated a lease and evicted the tenant has no further claim against the Lessee."

And in *Hermitage Company* vs. *Levine,* 248 N. Y. 333, Mr. Justice Cardozo (then Chief Judge of the Court of Appeals of New York), in denying a claim by a landlord against a tenant for damages following termination of lease, stated (p. 339) that the tenant's

> "liability for the future ended with the cancellation of the lease except in so far as he bound himself by covenant to liability thereafter."

On the other hand, where the lease provided for a reentry by the Lessor in case of bankruptcy or receivership, and provided further that in the event of such termination the Lessee should be liable to the Lessor in damages for the breach, this Court held that this covenant of the Lessee was not a covenant to pay rent but was a personal covenant which was valid and effective and which, in the event of such breach and termination, made the Lessee immediately liable to the Lessor.

Wm. Filene's Sons Company vs. *Weed,* 245 U. S. 597.

The Court, in that case, was dealing with the question of proof in an equity receivership, where the lease was terminated, in accordance with its express terms, by reentry by the landlord following the receivership and where the tenant's obligation to pay damages in case of such termination was expressly assumed in the original contract of lease; and this case is definite and conclusive authority to the effect that *upon the termination of the lease in the manner therein prescribed the Lessor's claim against the Lessee upon the special damage covenant immediately arose.*

Of course it must appear that the Lessee has bound himself not merely for such part of the term as he shall actually occupy but for the entire term, otherwise the doctrine of Lord Coke applies and his obligation ceases upon termination of the lease.

The exact time when the breach and termination occurred, and the claim for damages arose, was not material in the *Filene* case. The Court was dealing with an equity receivership, not with the technical bankruptcy statute. It is freely conceded that the landlord's claim in that case could not have been allowed had the Court been administering a bankrupt estate instead of an equity receivership. The reason for this, however, is to be found *not* in the nature of the claim but *in the fact that it arose after the bill (petition) was filed.* That this was the thought in the mind of the Court seems apparent from the language used (pp. 601-602):

> "We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question for the

courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741. Of course it does not matter that the claim was perfected by the petitioner's act, after a default in the rent."

The point decided in that case, which is vital to the issues in the case at bar, is that the claim for damages, under the express terms of the lease, arose as a liability *absolutely owing by the Lessee to the Lessor, immediately upon termination of the lease.*

2. The Measure of Damages Set Out in this Lease, i.e., the Difference between the Rent Reserved in the Lease and the Rental Value for the Residue of the Term Is Both Reasonable and Fair.

As authority for this proposition we need look no further than the case of *Wm. Filene's Sons Co.* vs. *Weed*, 245 U. S. 597, above cited, where it is said (Holmes, J., p. 602):

"The rest of the claim is for damages ultra the twenty thousand dollars a year—*the difference be-*

> *tween the rental value at the date of entry and the rent reserved,* less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not be paid. The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant *that liquidated the damages upon a footing that was familiar and fair* (citing authorities)." (Italics ours.)

It is clear upon reading the case that the "twenty thousand dollar clause" referred to was not material to the point involved.

The same doctrine was applied in the decision on the first of the two claims which were involved in *Gardiner* vs. *Butler & Company,* 245 U. S. 603, 604, where the measure of damage was precisely that prescribed in the case at bar, and the proof was again allowed.

The measure of damage which this Court held to be an unenforceable penalty in the *Kothe* case made no allowance whatever for the value of the leasehold estate which reverted to the landlord upon termination of the lease. If that measure of damage had been applied, it would have meant that the landlord not only regained the leasehold itself but in addition dividends in bankruptcy upon an amount equal to its then value. This inequity is avoided in the provision in the case at bar, and the landlord seeks to prove merely for the difference between what he was entitled to under his lease contract and what is left to him when he has lost it. In the *Kothe* case the amount of damage stipulated was

> "so *disproportionate to any damage reasonably to be anticipated* in the circumstances disclosed that we must hold the provision is for an unenforceable penalty" (p. 226). (Italics ours.)

and the Court also felt that the situation disclosed an improper purpose in that it found

> "the real design of the challenged provision was *to insure to the lessor preferential treatment* in the event of bankruptcy" (p. 227). (Italics ours.)

In the case at bar the purpose of the clause cannot fairly be criticized. It was to protect the landlord for the loss of his contract in case at time of termination the rental value of the premises had so declined that the rental which could then be obtained was less than when the lease was made. And the damage prescribed is that which was sure to follow if termination followed a decline in rental value. This measure of damage is, of course, the usual measure for breach of contract.

Williston on Contracts, Vol. III, par. 1405;

Restatement Law of Contracts, American Law Institute Contracts, par. 338;

In Re Mullings Clothing Company, 238 Fed. 58 (C.C.A. 2d 1916) (certiorari denied 243 U. S. 635);

Addieg vs. *Tull,* 187 Fed. 101 (C.C.A. 2d, 1911);

Leo vs. *Pearce Stores Co.,* 57 Fed. (2d) 340 (D.C. E.D. Mich. 1932).

And see cases cited by Holmes, J., in the *Filene* case *supra.*

The same rule is accepted in cases arising under the English Bankruptcy Acts.

Ex Parte Blake, 11 Ch. Div. 572, 1879;

Ex Parte Llynvi Coal & Iron Company, In Re Hide, L.R. 7 Ch. Ap. 28 (1871);

In Re Panther Lead Company, 1896, 1 Ch. Div. 978.

It is argued, in the brief of petitioner in *Irving Trust Company, Trustee,* vs. *A. W. Perry, Inc.,* that the measure of damage prescribed in this lease is different from that in *Wm. Filene's Sons Company* vs. *Weed, supra,* and that the clause in the instant case involves an inquiry as to fair rental value of the premises "as of the due date of each of the several installments of rent" (Petr's. Br. pp. 37-38). The material portion of the damage clause in the *Filene* case, as stated by the Court (p. 600), was:

> "to pay to the Lessor as damages, the difference between the rental value and the rent and other payments named in the lease for the residue of the term, etc."

In *Gardiner* vs. *Butler & Company, supra,* as stated by the Court (p. 604), it was that the Lessee

> "should pay to the lessor the difference between the rental value and the rent and other payments required for the residue of the term."

In the case at bar the provision is that

> "the Lessor shall forthwith upon such termination be entitled to recover of the Lessee * * * damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the demised premises for the residue of said term." (R. 10.)

This provision cannot in reason mean anything but the difference between (a) the amount of the rent reserved in the lease for the residue of the term, and (b) the fair rental value of the premises *at the time of such termination* for the residue of the term. This was the interpretation given in the *Filene* and *Butler* cases, and there is no discernable distinction between the clauses there

under consideration and the clause in this case, except that it would seem even clearer under the language in this lease that the rental value for the residue of the term was to be fixed *as of the time of termination.* A reference to the other damage clause prescribed in this same lease, applicable in the event of termination by voluntary act of the Lessor after default, etc., confirms this belief. The agreement in that case is that, in case of such termination,

> "the Lessee will pay to the Lessor as damages such a sum as *at the time of such termination* represents the difference between the rental value of the demised premises and the rent and other payments herein made for the remainder of the said term." (R. 9.) (Italics ours.)

There is no suggestion in either the *Filene* or the *Butler* case that there was any trouble in arriving at the amount of damages. In fact no greater difficulty exists in computing damages upon the basis thus laid down than in the case of the ordinary executory contract.

> *In Re National Credit Clothing Company,* 66 Fed. (2d) 371, C.C.A. 7th, July 15, 1933 (certiorari denied 54 Supreme Court Reporter 453).
>
> *In Re Mullings Clothing Company,* 238 Fed. 58, 64 (C.C.A. 2d Nov. 14, 1916), quoting with approval from *Kalkoff* vs. *Nelson,* 60 Minn. 284.

The measure of damages prescribed is simple. The aggregate of the rentals reserved in the lease for the period following termination is readily ascertainable from the terms of the lease itself. The rental value for the residue of the term must mean the aggregate of similar rentals which could be obtained in a lease made as of

the date of termination and extending from that date to the date when the original lease to the bankrupt would have expired (see opinion of the Court below in *Outfitters' Operating Realty Company* case). This is easily susceptible of proof either by evidence of an actual letting of the premises, by rental values of similar properties at that time, or by the testimony of those familiar with real estate and business conditions in the locality, or by all these kinds of evidence; and there may well be other kinds. The problem of estimating at any given time the rental value of a given property for a given term in the future, is *a problem with which the landlord is faced every time he makes a lease.* Congress has made provision in Sec. 63 (b) for the liquidation of claims of this character.

It will be argued that fair rental value for the future cannot be estimated because of provisions relating to termination and abatement of rent which must be regarded as inserted in the assumed new lease, made as of date of termination of the old, similar to provisions regarding those matters in the old lease. In estimating damages for breach of contract, however, in the ordinary case, the computation is made upon the theory that, but for the breach, there would have been complete performance by both sides, notwithstanding that most contracts provide for contingencies whereby performance by one party or the other may be excused, for example, strike clauses, etc. The existence of such contingencies has never been deemed a serious obstacle to the determination of the damages in a civil action or, we believe, in determining the amount of proof allowable in bankruptcy. Moreover, in the determination of the rental value of premises for the period following the termination by petition filed, the failure to allow for such con-

tingencies as termination of the assumed new lease or abatement of rent thereunder is wholly favorable to the bankrupt estate, as it means that the value arrived at will be larger than if those allowances were made, and the amount of the proof correspondingly less.

The Court below, in the *Outfitters' Operating Realty Company* case, deemed it proper not to allow proof for the full amount of the difference between these two sums but to compute the present value of each of the future installments of damage—each installment consisting of the difference between the rent stated in the lease for that period and the rental value for the same period based upon the assumed lease made as of the date of the petition. This computation was made by discounting each of these installments for the period from the present time to the due date of the respective installments.

The proof in the case at bar was computed in the manner thus indicated and the discount was taken at 6% (R. 13-14).

In the *Filene* case, while a discount was computed with reference to the payments of $20,000. a year for the residue of the term under the express terms of the lease, it does not appear that any discount was found necessary in computing the damages on the basis of "the difference between the rental value and the rent and other payments named in the lease for the residue of the term," and it may fairly be argued that the measure of damage, as prescribed, is sufficiently close to the actual damages "reasonably to be anticipated" so that it *may be applied without discounting the future payments.* These respondents, however, submit the case to the judgment of the Court without further argument upon this point.

3. Since the termination of lease, upon which event the Lessee became immediately liable to the Lessor for damages measured as above, was coincident with the filing of the petition, the liability is provable under Section 63 (a) (4).

The authorities cited above establish (a) that under a lease which provides that bankruptcy shall constitute a breach and termination of the lease, and that upon such breach and termination the Lessee shall be liable to the Lessor in damages, these provisions are effective to terminate the lease upon the stated contingency and, coincident with such termination (provided the measure of damages is fair), to create the liability on the part of the Lessee for damages on account of the breach; (b) that the measure of damages prescribed in this lease, to wit, the difference between the rent reserved in the lease for the residue of the term and the fair rental value of the premises for the residue of the term, is fair and proper, and indeed is the usual or customary measure of damage. In accordance with these principles it follows that, *upon the filing of the petition* by the bankrupt in this case, the lease was *ipso facto* breached and terminated, and the Lessee *at that moment* became liable to the Lessor for damages measured in accordance with the rule thus prescribed.

It will hardly be questioned that this is a liability "founded upon * * * a contract express or implied" Sec. 63 (a) (4). It remains, therefore, only to show that such claim for damages, arising coincident with and by reason of the filing of the petition, is a claim which existed and was owing "at the time of the filing of the petition" within the meaning of Section 63 (a) of the Bankruptcy Act.

This proposition, like the previous propositions as to the creation of the liability and the measure of damages, is established by the decisions of this Court. In *Central Trust Company* vs. *Chicago Auditorium Association,* 240 U. S. 581, the Chicago Auditorium Association had granted to the Scott Transfer Company the baggage and livery privilege of the Auditorium Hotel for a period of five years, the Transfer Company agreeing to pay $100. a month for the baggage privilege and $250. a month for the livery privilege. During the said term a petition in bankruptcy was filed by creditors against the Transfer Company and adjudication followed. It was held that bankruptcy constituted an anticipatory breach of the contract and that the claim for damages resulting therefrom was provable. The Court said, (pp. 592, 593):

> "The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of § 63a-4, and the damages may be liquidated under § 63b. *Grant Shoe Co.* v. *Laird,* 212 U. S. 445, 448. It is true that in *Zavelo* v. *Reeves,* 227 U. S. 625, 631, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte Pollard,* 2 Low. 411, Fed. Cas. No. 11,252, that *it would be 'an unnecessary and* [illegible] *filing the petition that wrought the breach, therefore there was no breach at the time of the petition.* And as was also declared in *In re Pettingill,* 137 Fed. Rep. 143, 147: 'The test of provability under the Act of 1898 may be stated thus: *If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract* in question, and by repudiating its obligation, *could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the credi-*

tor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. 562).' " (Italics ours.)

The principle is further supported by the decision of the Circuit Court of Appeals for the First Circuit in *R. C. Taylor Trust* vs. *Kothe,* 30 Fed (2d) 77 (1929) reversed by this Court only on the ground that the measure of damages was so far excessive as to constitute a penalty.

It is only by the admission of this principle that any claim of damages, based on anticipatory breach caused by the bankruptcy itself, can be held provable; and there are many other cases where bankruptcy has been held to constitute an anticipatory breach and proof for the damages so caused has been allowed.

In Re Portage Rubber Company, 296 Fed. 289 (C.C.A. 6th 1924);

In Re Schultz & Guthrie, 235 Fed. 907 (D.C. D. Mass. 1916);

In Re Desnoyers Shoe Company, 227 Fed. 401 (C.C.A. 7th 1915);

In Re Neff, 157 Fed. 57 (C.C.A. 6th 1907);

[illegible] 1905);

In Re Stern, 116 Fed. 604 (C.C.A. 2nd 1902);

In Re Swift, 112 Fed. 315, 321 (C.C.A. 1st 1901);

Cobb vs. *Overman,* 109 Fed. 65 (C.C.A. 4th 1901);

Ex Parte Pollard, Fed. Cas. No. 11,252.

4. There is no "historical distinction" which, under these circumstances, can justify the exclusion of this claim from proof.

In briefs supporting the petitioner's contentions, it is argued that, notwithstanding these principles, this claim must nevertheless be excluded from proof because of an "historical distinction" between leases on the one hand and ordinary contracts on the other; and the *Manhattan Properties* case, and the long line of decisions which are reviewed in that case, are cited apparently as supporting this argument.

Much of the argument under sub-division I of this brief, in which the distinctions both as to facts and law between this case and the *Manhattan Properties* case are discussed, is pertinent here as indicating that the ancient doctrines relied on by the petitioner really have nothing to do with the question here. Those doctrines relate to conditions and circumstances which determined whether a liability did or did not arise at a given time. They do not relate to the question whether or not, if a liability for breach of an express contract actually existed at the time of petition filed, its provability depended on the particular kind of express contract which had been breached.

The historical distinctions which are in reality established are merely these, namely: (1) that future rent is dependent upon continued tenancy and for that reason differs from other future obligations even in lease contracts which are made payable without condition or contingency; (2) that even since it has been held that contingent claims may be proven, (*Maynard* v. *Elliott,* 283 U. S. 273), yet claims for future rent are still not provable; the reason for this distinction resting upon Lord Coke's doctrine of the inseparable relation between the

rent and the continued tenancy; (3) that the doctrine of anticipatory breach, applicable in case of executory contracts generally does not apply to terminate a lease upon bankruptcy, in the absence of express agreement embodied therein; (4) that upon termination of a lease for default, or by reason of the happening of a condition, the liability of the tenant is at an end "except in so far as he bound himself by covenant to liability thereafter."

These principles have been applied quite consistently in the decisions. It has been generally recognized that, where a lease was terminated, the Lessor had no claim against the Lessee for damages for the breach, either in connection with proof in bankruptcy or otherwise, unless the tenant had bound himself by express covenant to such liability. Where the Lessor sought to prove for future rent, it has been recognized, under the doctrine of Lord Coke, that the claim was wholly *in futuro* and so far dependent on continued tenancy that it did not exist at time of petition filed, even as a contingent claim. Where the Lessor sought to prove either for future rent or for damages on the theory of anticipatory breach by reason of the filing of the petition, the claim has again been disallowed. Where the claims of the Lessor were based on express agreements of the Lessee, which were either to be performed at some future time, or which came into existence only by virtue of some circumstance after petition filed, they were properly excluded from proof either because the *contract* itself or the *obligation* of the Lessee under it arose too late, or because the events which should some day determine the *amount* of the future obligation were too uncertain and speculative.

There is no historical basis, however, nor is there any basis in statute, decision or doctrine to justify disallowance of a claim which is *founded upon an express con-*

tract, which arose as an *absolute obligation coincident with the filing of the petition* and which is provided to be liquidated under a *fair measure of damages*. The claim in the case at bar fulfills all these requirements and the proof would not be questioned were it not that this particular *contract* happens to be a *lease* of real estate. Certainly the Bankruptcy Act makes no exception in the case of leases and no distinction between one kind of express contract and another. Neither the distinctions which are suggested above nor the soundness of those distinctions can well be questioned, but they do not touch the present case.

III.

There is no Indication that Congress Has Manifested Any Intention to Exclude Claims of this Type from Claims Provable under Section 63 (a) (4).

If we are correct in the foregoing arguments, it appears that, under the law as it stood prior to the amendments to the Bankruptcy Act of June 7 and June 18, 1934, this claim was provable under Section 63 (a) (4); but it is contended that Congress, by the amendments of June 7 and June 18, 1934, has indicated an *intention* that the claim should *not* be thus provable. We submit no such intent appears.

The Act of June 7, 1934 amended Section 63 (a) by adding to the previously existing clauses defining provable claims several new clauses, including Clause (7), which reads as follows:

> "(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or

> for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act."

The Act of June 18, 1934 merely added the following at the end of the foregoing clause, namely,

> "in which the time for filing such claims has not expired."

These amendments of course have no *direct* application to the case at bar, because the time for proving claims in this case had long since expired, but it is sought to give effect to them *indirectly* and *retroactively* as indicating an intention of Congress with respect to the provisions of Section 63 (a) which were enacted many years ago.

Here again it would have seemed unnecessary to argue this point but for the stress which is laid upon it in the briefs supporting petitioner's case, notably the brief of petitioner herein, and in that of *amici curiae* in the *Outfitters' Operating Realty Company* case. If the claim here sought to be proved is specifically within the provisions of Clause (4), that is, if it is founded upon an express contract and existed at the time of petition filed, it would seem that there is no room to argue a contrary

intent on the part of Congress, on the basis of a subsequent enactment, for if it falls within Clause (4) then Congress, by that clause, has expressly said that it *may* be proved. But let us examine the arguments.

It is argued that the intent of Congress to exclude claims of this type was manifest before these amendments, and to support this proposition it is said that this Court decided the *Manhattan Properties* case upon the theory that Congress intended that *no* claims "for damages consequent on the abrogation of leases" should be provable. It is argued also that, in the enactment of the new Clause (7), it was the intent of Congress to change the then existing law and to add a new type of provable claim which should include the claim in the case at bar. It will be observed that these arguments assume a complete change of mind on the part of Congress, first, prior to June, 1934, an intent that *no* claims based on the abrogation of leases should be provable, and second, an intent arising at that date that *all* such claims should be provable. It assumes further not only that this particular type of claim was condemned by the Court in the *Manhattan Properties* case but also that it was specifically in the mind of Congress and specifically intended to be made provable by the new Clause (7). We have already noted, what would have seemed to be an obvious fact, that this Court, in the *Manhattan Properties* case, took pains to make it clear that it was *not* passing upon the kind of claim which is now presented.

The actual intention of Congress becomes obvious when we consider the enactment of June 7, 1934 in its relation to the decision of this Court in the *Manhattan Properties* case. Congress took this action quite promptly after that decision, and in so doing apparently acted upon the Court's suggestion that if the rule applicable to the kind of claims there involved was to be

changed, "Congress should so declare," (p. 336). The natural conclusion is that in enacting this provision, Congress intended to make provable the kind of claims which this Court, in the *Manhattan Properties* case, had held not provable; to reverse in part, i.e. subject to the limitations expressly stated in the new Clause (7), the rule laid down by judicial construction in that case.

It requires no labored argument to show that in enacting this new Clause (7) Congress intended to change the law as it had previously existed. That seems obvious and is freely conceded; but it does not by any means follow that there was any intention to change the law regarding the provability of claims of this type; and there is no evidence or suggestion that the particular kind of claim with which we are here concerned was either in the composite mind of Congress or in the minds of the proponents of the Amendment of June, 1934, or of the Committees which considered it.

Before proceeding to discuss the question whether the language in the new Clause (7) is sufficiently broad to include claims of this type, it may be fair to suggest that, even if it is, yet the various clauses of Section 63 (a) were not intended to be mutually exclusive. It is suggested, for example, that many claims in the ordinary bankruptcy might be deemed provable either under Clause (1) or Clause (4). Any "fixed liability evidenced by an instrument in writing" (Cl. 1) may be, and ordinarily is, a debt founded upon an express contract (Cl. 4). Even if it were determined, therefore, that this claim is covered by the new Clause (7), it would not follow that it is not provable under Clause (4). The claim which was held provable in *Central Trust Company* vs. *Chicago Auditorium Association*, 240 U. S. 581, was a claim "respecting (an) executory contract." Will it be contended that by the new Clause (7) Congress intended to indicate

that this claim was not "founded upon a contract express or implied" within Section 63 (a) (4), which this Court in that case held it was?

But it is submitted that this kind of claim is in reality not included within either the language or the intent of the new Clause (7). A careful study of the language used confirms the conclusion drawn from the sequence of events above discussed, that this new clause was prepared with particular reference to the kinds of claims involved in the *Manhattan Properties* case, i.e. to claims for or relating to future rents, and based either upon the rent covenant or upon the indemnity covenant.

In the brief filed by *amici curiae* in the *Outfitters'* case, it is stated (P. 26):

> "The clause is difficult, if not impossible, to parse and must be read and interpreted in the light of the general background of recent events in bankruptcy law, such as the *Manhattan Properties* case and the general attack by landlords on the statutory exclusion of their claims from provability in corporate bankruptcies."

We may perhaps fairly criticize the use of the words "statutory exclusion" as begging the question, but the rest of this quotation seems to be a fair statement. There is no doubt the clause is far from clear.

The only affirmative language in the new Clause (7), describing the new class of provable claims, is the fol-lowing:

> "Claims for damages respecting executory contracts including future rents."

The next clause indicates that such claims may be proved whether the bankrupt be an individual or a corporation. All the rest of the clause is merely language of qualification and limitation. Under recognized rules of inter-

pretation, these qualifications and limitations must relate to the claims which are made provable by the affirmative language and, while the language of limitation may assist in explaining and interpreting the kind of claims which are made provable, it cannot enlarge that description. So far as the present discussion is concerned, the claims which are made provable under this affirmative language are "claims for damages respecting * * * future rents" and possibly "claims for damages respecting executory contracts * * * (for) future rents." Had Congress intended to include in this new language claims for damages for *breach of lease*, it would have been easy to say so directly, but Congress did not so state. The words "executory contracts" are not apt to refer to leases, but the agreements which are contained in every lease, whereby the Lessee agrees to pay the rent and perform certain other obligations in the future, *are* executory contracts, and so are contracts to indemnify for loss of future rents. This language is therefore most appropriate to describe claims of the character of those involved in the *Manhattan Properties* case, claims for rent to fall due in the future or claims under covenants to indemnify for loss of such rents. The claim in this case is not, if we speak at all accurately, a claim "respecting an executory contract"; it is not based on an agreement by the Lessee to do something in the future. While the damage clause, under *Gardiner* vs. *Butler, supra,* or something equivalent, may be essential to the existence of the damage claim, the statement that "the Lessor shall * * * be entitled to recover of the Lessee * * * damages for such breach in an amount, etc.," is not in the ordinary meaning of the words a promise or covenant by the Lessee as to some future action by him; it is rather the *equivalent of an agreement by the Lessee that he will carry the lease for the full term, the damages being the conse-*

quence if he fails, and the landlord's claim for damages is based on the Lessee's breach of that obligation. It matured the instant the petition was filed and from that moment the Lessee's obligation under all the "executory agreements" in the lease ceased to exist. The damage claim, however, remained and sounded in breach of contract. The affirmative language in Clause (7) describing the claim, as above quoted, obviously has reference to claims regarding contracts which are still executory after petition filed, whereas the present claim had become a definite fixed liability at the time of petition filed, subject only to being liquidated. It no longer looked to the future.

The language which limits the amount of the proof is also significant of the same intent. The claim which is thus limited is the claim of the landlord "for injury resulting from the rejection by the trustee of an *unexpired* lease of real estate or for damages or indemnity under a covenant contained in *such* lease." This language is apt to describe only leases which are in effect after petition filed, which the trustee may either adopt or reject, regardless of whether they may or may not be terminated by the Lessor after and by reason of the bankruptcy. It is not apt to describe a lease which terminates *ipso facto* on the filing of the petition and as to which the trustee has no option to adopt or reject.

Moreover, having in mind not merely the state of the law as it existed in June, 1934, but also the broad purposes and policy of the Bankruptcy Act (discussed in sub-division IV below), the limitation as contained in Clause (7), whereby the amount of the claims thereunder which are permitted to be proved is limited to the amount of one year's rent, would seem consistent only with an intention that it should be applicable only to claims for future rent and damage or indemnity covenants with respect to future rent. But for this amend-

ment, such claims, if the bankrupt were an individual, could be prosecuted against him after his discharge. They would not be barred. By this provision Congress gives a measure of relief to landlords. If this limitation should be held applicable to such claims as that involved in this case, it would mean not only that the landlord would be deprived in part of his participation in the assets but that the entire excess over the amount of proof allowed would remain to embarrass the individual bankrupt in his efforts to re-establish himself after bankruptcy.

The Circuit Court of Appeals, in the *Outfitters' Operating Realty Company* case, 69 Fed. (2d) 90, said (at p. 91):

> "But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court *is not liquidating a future loss at all;* in its place the parties have substituted a promise, which *does not look to the future,* which is to pay the difference between two amounts presently ascertainable." (Italics ours.)

A similar provision was under discussion by this Court in *Wm. Filene's Sons Co.* vs. *Weed,* 245 U. S. 597, at 602, where the Court said:

> "The contract was not that all the rent for the term should become presently due, *it was not for rent at all,* but was a *personal covenant* that liquidated the damages upon a footing that was familiar and fair."

The claim in this case is not in any sense a claim for "future rent" or for damages or indemnity against loss of rent. It is broader than that; it is a claim based upon the breach of the entire lease contract, because that contract was terminated by the filing of the petition in bank-

ruptcy and because damages for this entire breach thereupon accrued. Whatever else this lease may be, it is a contract between the parties. Where such lease contract exists and the lessee has affirmatively undertaken to perform for the entire term and to be liable in damages if he does not, and where such contract is breached and terminated by bankruptcy, there is no rational reason for denying to the landlord, merely because he is a landlord, the right to prove his claim for damages in an amount which fairly represents the damage sustained by him from the loss of the contract.

IV.

Not only is the Allowance of This Proof in No Manner Inconsistent with the Bankruptcy Act, but its Disallowance Would be in Direct Violation of the Policy of That Act.

In the briefs filed in support of the contentions of the petitioner, in this case and in the *Outfitters' Operating Realty Company* case (No. 22, October Term 1934), it is suggested, and even argued, that the contention of the landlords in these cases is based upon the theory that some "magical formula or covenant" has been sought for and found whereby the claim is made provable, although such proof is "contrary to the Bankruptcy Act"; that the landlords are attempting by stipulation to "change an unprovable claim into a provable one," and "to evade the purpose of the Bankruptcy Act"; that they are attempting "to evade the long established rule * * * by mere recourse to express covenants"; that they are engaging in a "game of words."

It would seem quite unnecessary to refer to these aspersions were it not that so much space and effort are de-

voted to them in these briefs, which indeed may perhaps suggest a consciousness that more logical grounds of opposition are absent.

Their argument is superficial. The distinction between the lease clauses involved in the *Manhattan Properties* case and those in the case at bar is not a mere matter of words; it is not a mere matter of inserting an "express covenant"; it is much more than a mere agreement that a non-provable claim may be proved; it is an *essential difference in the fundamental structure of the leases.* The provision in the case at bar inserted in the lease a condition, the happening of which constituted a breach of the lease and terminated the leasehold. That condition was the filing of the petition in bankruptcy.

In the *Manhattan Properties* case the rent contracts and the indemnity contracts (when they arose) were in truth "executory." The facts and circumstances in the case at bar, to which the bankruptcy law must be applied, are so far different from those in the *Manhattan Properties* case that they call for a different result. There is no inconsistency in holding one claim provable and another not provable, where the facts are different.

It is readily conceded that the purpose of this provision, whereby the lease itself is *ipso facto* breached and terminated on petition filed, and the Lessee is made liable in damages, was to give the landlord, in the event of bankruptcy, a provable claim—not, however, for loss of future rent but for the loss of his lease and contract; its purpose was to do equity where it appeared that there was inequity, to give the landlord the right to damages against the bankrupt estate for the loss of his contract, just as other parties who had contracted with the bankrupt might prove in damages for the loss of their con-

tracts where those contracts did not relate to the occupancy of land but were breached by the bankruptcy.

The insertion of this condition in the lease involves no possible opportunity for evasion *so far as the landlord is concerned.* The provision is agreed on when the lease is made. The Lessor has thereafter no control over this contingency of the bankruptcy of the Lessee. If bankruptcy comes, the lease is at an end, which may or may not be an advantage to the Lessor. In the natural course, termination by the bankruptcy of the Lessee would be of advantage to the Lessor *only* if rents have *risen.* If they have declined, the termination is an injury to the Lessor, for his contract of lease has been breached and lost. It is this damage for which he seeks to prove, and there can be no question of the equity of his claim.

The only possibility of evasion in connection with such a clause is the possibility of evasion *by the Lessee* who may, if he chooses, file a voluntary petition and thereby effect a termination. If it were to be held that the landlord's claim in such case, for the reasonable measure of damage which is here prescribed, could not be proved, there would indeed be strong inducement to corporate lessees, where rents have declined, to terminate their leases by the device of a fictitious or collusive bankruptcy and a tempting avenue to fraud would be opened.

This possibility is emphasized in the case of the large chain stores and similar organizations, where leases are taken in the names of one or more subsidiary corporations which can be abandoned after bankruptcy. It exists also, however, in the case of any corporate lessee where the bondholders, noteholders or creditors, or even stockholders, can combine to take over the assets of the bankrupt company. If the petitioner's contention is sustained, it will not be difficult for the parties in interest in such cases to get rid of the obligation of existing leases,

where rentals have declined so that similar premises can be obtained at a lower rent, and for those who have bound themselves by contract to carry this burden to shift it to the shoulders of others.

If a measure of damages is attempted to be set up in such a lease, which is unreasonable or which involves a penalty, the remedy is not far to seek. Such unreasonable claim or penalty will be disallowed by the Court, notwithstanding the termination of the lease by the event of bankruptcy, as was done in *Kothe* vs. *R. C. Taylor Trust,* 280 U. S. 224. No landlord can by any form of words entitle himself upon termination to a penalty or to more than a fair and reasonable measure of his damage.

But these respondents go further. They sumbit that a disallowance of this claim would violate the policy and intent of the Bankruptcy Law. This law is based upon two broad policies, *first* to distribute all the assets of the bankrupt estate equitably among all creditors of the bankrupt, and *second* to give the bankrupt a new start free from previous obligations.

In *Williams* vs. *United States Fidelity Company,* 236 U. S. 549, 554-555, the Court said:

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." (Citing cases.)

In *Central Trust Company* vs. *Chicago Auditorium Association,* 240 U. S. 581, 591-592, the Court, after first approving this doctrine, continued as follows:

> "Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to perform."

In *Kothe* vs. *R. C. Taylor Trust,* 280 U. S. 224, at 227, the Court said:

> "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor."

To the same effect are

Maynard v. *Elliott,* 283 U. S. 273, 277.

Manhattan Properties Inc. v. *Irving Trust Co.*, 291 U. S. 320, 331-332.

The position of a landlord who has entered into a lease at a fair rental and finds such lease breached and terminated by the bankruptcy of the Lessee at a time when the premises can be re-let, if at all, only at a reduced rental, is not different in substance from that of a party who has entered into an executory contract with the bankrupt and finds that contract breached and terminated by the bankruptcy. Both are creditors; and no distribution of the assets of the bankrupt estate among creditors is equitable which does not allow such claims to participate pro-rata.

It seems equally clear that if this claim is not provable against the bankrupt estate, it will continue to exist as a claim against the bankrupt. This is perhaps not of great importance in corporate bankruptcies, in view of the ease with which lessee corporations may be abandoned when they are no longer wanted; but it is of vital importance to the individual lessee.

Thus, if these claims are not allowed, both of these recognized purposes of the bankruptcy law will be thwarted. On the one hand, creditors who have equal standing with other creditors, not only as matter of law but also in fairness and equity, will be denied any participation in the assets and, on the other hand, the individual bankrupt will have to make his new start, not only without assets but burdened with liabilities carried over from the past which may well be a millstone about his neck.

V.

The judgment of the Circuit Court of Appeals for the Second Circuit, affirming the order below whereby the claim was allowed, should be affirmed.

Respectfully submitted,

BURTON E. EAMES,
GEORGE B. ROWLINGS,
Counsel for Respondents.

TYLER, EAMES, WRIGHT & REYNOLDS,
Of counsel.

November, 1934.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1934.

Irving Trust Company, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt, Petitioner,
vs.
Ingersoll Bowditch, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 3, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

This case is ruled by No. 22, decided this day. The stipulation in the lease is in all pertinent respects similar to that involved in No. 22. The judgment of the Circuit Court of Appeals, affirming an order of the District Court admitting proof of claim, was therefore right, and is affirmed.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.